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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

MARY LOBUE,

Petitioner,

vs.

THE STATE OF NEVADA, *ex rel.* Department of Highways,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Nevada.

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Question Presented for Review.

The question presented for review in this proceeding is whether there has been a violation of the Fifth and Fourteenth Amendments of the United States Constitution where the highest court of a state in rendering conflicting decisions has effectively deprived a property owner of any remedy for the recovery of just compensation for property which had been taken for public use.

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MARY LOBUE,

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THE STATE OF NEVADA, *ex rel.* Department of Highways,

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Nevada.

Petitioner, MARY LoBUE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Nevada entered in this proceeding on June 4, 1980, rehearing denied on December 30, 1980.

Opinions Below.

The opinion of the Supreme Court of the State of Nevada entered on June 4, 1980, is reported in 96 Nev. 505, 611 P. 2d 1077 (Appendix "B"). A rehearing was denied on December 30, 1980 (Appendix "C"). Previous opinions of the Supreme Court of the State of Nevada in this matter are reported in 83 Nev. 221, 427 P. 2d 639 (Appendix "D"); 87 Nev. 372, 487 P. 2d 506; 92 Nev. 529, 554 P. 2d 258 (Appendix "F").

Jurisdiction.

The opinion of the Supreme Court of the State of Nevada was entered on June 4, 1980. A timely petition for rehearing was denied by the Supreme Court of the State of Nevada on December 30, 1980.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

Question Presented.

The Federal question presented in this case is whether there has been a violation of the Fifth and Fourteenth Amendments to the United States Constitution where the highest court of a state in rendering conflicting decisions has effectively deprived a property owner of any remedy to recover just compensation for property which had been taken for public use.

Constitutional Provisions Involved.

United States Constitution, Amendment XIV, Section 1, reading in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment V, reading in part:

> ". . . nor shall private property be taken for public use, without just compensation."

Statement of the Case.

In 1947 Mary LoBue and her former husband, Vincent LoBue, residents of the State of California, purchased for investment purposes approximately eighty acres of unimproved desert land located in the unincorporated territory of Clark County, State of Nevada, southerly of the City of

Las Vegas. This property had frontage on the east on United States Highway 91, the major highway connecting the City of Las Vegas with the populated areas of Southern California. Over the intervening years, Highway 91 (now known as Las Vegas Boulevard, or more commonly "The Strip") has developed into a fashionable thoroughfare providing frontage for many luxury resort hotels. The LoBue property, as one of the last undeveloped, sizable parcels of land in the area, has substantially increased in value. By a complicated chain of events and legal proceedings, which have included four costly jury trials and four appeals to the Supreme Court of the State of Nevada, 3.8 acres of this valuable property have been acquired by the State of Nevada for highway purposes without the payment of the just compensation mandated by both the State and federal constitutions.

In 1957 the LoBues were advised by representatives of Clark County that the County was in need of the northerly seventy feet of their property for the extension and improvement of Bond Road (since renamed Tropicana Avenue, comprising 3.8 acres, and the westerly forty feet for the extension and improvement of Industrial Road. It was represented to them that Industrial Road was to be constructed as a major highway which would lead south from the City of Las Vegas, past the subject property, eventually merging with Highway 91 several miles to the south, and that Bond Road would be improved to county standards as an east-west lateral highway. If these highways had been constructed as represented, the LoBue property would have been provided with frontage on three major highways, two carrying traffic to and from Las Vegas and the populated areas of Southern California, and the other extending from the Mt. Charleston recreational areas on the west, easterly past the subject property to the vicinity of Lake Mead and

Hoover Dam. On the basis of these representations the LoBues executed a deed to Clark County of the requested parcels "for street and road purposes." No monetary consideration or other consideration was paid for the property being acquired.

The Supreme Court of the State of Nevada has ruled that the evidence supported the trial court's finding that this transaction resulted in the creation of a binding contract which obligated Clark County to extend and improve the highways in the manner proposed or to respond in damages for its breach. *State of Nevada v. LoBue*, 83 Nev. 221, 427 P. 2d 639 (Appendix "D"); *State of Nevada v. LoBue*, 92 Nev. 529, 554 P. 2d 258 (Appendix "F"). It has been stipulated that the State of Nevada has assumed Clark County's obligation to respond in damages.

Before Clark County could complete its acquisitions of the properties needed for the extension of Industrial Road or even to improve Bond Road beyond a little rough grading, it abandoned these projects because the State of Nevada had commenced proceedings for the acquisition of rights of way needed for the construction of Interstate Highway 15 as a part of the "National System of Interstate and Defense Highways" and Tropicana Avenue as a Federal Aid Secondary Route, with the major portion of the cost of these projects to be funded by the federal government under the Federal-Aid Highway Act, Title 23, United States Code, sections 101 et seq. The plans for the construction of Interstate Highway 15 provided for an elevated, limited access freeway on a north and south alignment with an overpass, together with off- and on-ramps at Tropicana Avenue. Tropicana Avenue was to be improved with restricted access and a median divider, which would seriously restrict vehicular access to the LoBue property. Since Interstate 15 was to be superimposed upon a portion of the proposed Industrial

Road, it precluded the construction of this road in the manner represented by Clark County.

This construction project required as a part of the right of way not only the seventy-foot and forty-foot in width parcels previously deeded to Clark County, but also an additional 5.19 acres from Mrs. LoBue. The Division of Highways of the State of Nevada obtained a quitclaim deed from Clark County describing the forty-foot and seventy-foot parcels, with presumptive knowledge of the representations that had been made by the officials of Clark County to the LoBues. It then caused to be filed a proceeding in eminent domain to acquire the additional acreage needed for the construction of the proposed freeway project. The complaint failed to include the 3.8 acre parcel which represented the seventy-foot in width parcel included in the quitclaim deed from Clark County to the State. Likewise, it did not purport to condemn such rights as might be appurtenant to the property as a result of the promises made by Clark County. Mary LoBue answered the complaint and filed a counterclaim in which she alleged that on the abandonment of the Clark County project for the extension and improvement of Industrial Road and Tropicana Avenue, she was entitled to compensation for the property described in the deed to Clark County. The trial court agreed with this contention and the 3.8 acres were included in the eminent domain proceeding. The jury concluded that the 5.19 acres, together with the 3.8 acres, had a fair market value of $548,525.00 and that the remaining property had suffered damages in the amount of $108,205.00 as a result of the severance of the property sought to be acquired and the construction of the proposed improvements, and that the State was entitled to an offset against the severance damages for special benefits in the sum of $5,000.00. Judgment was entered accordingly.

On the State's appeal this judgment was reversed, *State v. LoBue*, 83 Nev. 221, 427 P. 2d 639 (Appendix "D"), the Court holding that there was no legal or equitable basis for the cancellation of the deed from the LoBues to Clark County, even though Mrs. LoBue sought only damages and was not making demand for return of the property to her. The Court held, however, that Clark County had acquired the 3.8 acre parcel under a contractual obligation, but ordered that the eminent domain proceeding be retried because the award for the acreage acquired had been made in a lump sum and the Court could not determine what portion of that sum represented the value of the 3.8 acre parcel. The Court concluded:

> "Therefore, we reverse and remand for another trial to determine just compensation, severance damages, and benefits, if any, due to the State's condemnation of the two parcels totaling 5.19 acres. The disputed parcel (3.80 acres) is removed from this litigation and the State's title thereto confirmed.
>
> . . .
>
> We conclude that, in these circumstances, the grantor's [LoBue] remedy for the failure of Clark County to construct the roads is an action at law for damages; not a suit in equity to cancel the deed. The reason for withholding equitable relief is the need for preserving the finality of a deed and the integrity of title to real property. This can best be accomplished by limiting the grantor to the remedy of damages. We express no opinion on the point of damages."

Thus, the order of remand required in effect entirely separated trials of the eminent domain portion of the action from the action for damages for breach of contract.

The retrial of the eminent domain portion of the case resulted in a judgment determining the value of the 5.19

acres taken as $230,766.84, severance damages of $93,777.97 and special benefits of $38,904.17.

After much skirmishing involving two more appeals to the Nevada Supreme Court, the matter of damages for the breach of contract was presented to a jury. On the basis of expert testimony the jury concluded that if the highways had been extended and improved in the manner represented by Clark County, Mrs. LoBue's property would have had a fair market value of $1,145,882.00, but without the promised improvements its value was $838,450.00—a difference of $307,432.00—which difference, under Nevada law, would represent the damages for such a breach. *Meredith v. Washoe County School District*, 84 Nev. 15, 435 P. 2d 750 (1968). The trial court, however, allowed the jury to engage in speculation whether any of these damages had been included in the condemnation award and, on the basis of the jury's findings and its own findings, determined that the damages should be reduced by the sum of $57,134.84. A judgment in the sum of $249,297.16, together with interest at 7% from September 6, 1962, was entered (Appendix "A").

Both the State of Nevada and Mrs. LoBue appealed from this judgment, Mrs. LoBue contending on her cross-appeal that it was improper to deduct any portion of the eminent domain award from the damages to be awarded for the breach of contract, since such a reduction would to that extent deny her the just compensation guaranteed by both the State and federal constitutions.

On the fourth appeal in this proceeding, *State of Nevada v. Mary LoBue*, 96 Nev. 505, 611 P. 2d 1077 (1980) (Appendix "B"), the Supreme Court of the State of Nevada reversed the judgment with the direction to enter a judgment for the State, notwithstanding that the Attorney General of the State of Nevada, on behalf of its Highway Department,

recognizing that it was not entitled to a final judgment for the State, sought a reversal and remand together with appropriate instructions to the trial court regarding the measure of damages. Mary LoBue's petition for rehearing was denied on December 30, 1980 (Appendix "C").

The net effect of this protracted litigation is to vest in the State of Nevada title to 3.8 acres of land for which it has not paid just compensation guaranteed by the State and federal constitutions, either in the form of an award for the fair market value of the property acquired or in the form of damages for the failure of Clark County to provide the promised consideration for the property. The Supreme Court failed to note that because of its bifurcation of the eminent domain trial from the breach of contract trial, Petitioner was precluded from establishing the breach of contract damages as a part of the severance damages in the eminent domain proceeding and therefore, by reason of the Court's own order, the rule of collateral estoppel could not apply.

By actions seemingly of prestidigitation, the State of Nevada has caused just compensation, in a sum that should exceed three hundred thousand dollars, to vanish into thin air.

Mary LoBue has repeatedly raised the issue of her constitutional right to just compensation under both the State and federal constitutions, the most recent references being made in her Opening Brief on Cross-Appeal [p. 1], in her Reply Brief [p. 7], and more extensively in her Petition for Rehearing [pp. 18-19] on the fourth appeal. The federal constitutional issue was not argued extensively in this litigation because the Nevada State constitution also guarantees just compensation, and it was not until the rendition of the last opinion by the Nevada Supreme Court that it became

apparent that Petitioner was to be deprived of all compensation for the 3.8 acres of land that had been taken from her.

REASONS FOR GRANTING THE WRIT.

I.

The Federal Constitution Prohibits the Expropriation of Private Property for Public Use Without the Payment of Just Compensation Even Though the Expropriation Is the Result of a Failure to Provide an Adequate Remedy.

The constitutional principles applicable to this proceeding were exceptionally well defined by this Court over eighty years ago in *Chicago B&Q R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897). As though speaking with reference to the instant case, there this Court observed:

(P. 233)

"It is therefore necessary to inquire at the outset whether 'due process of law' requires compensation to be made or secured to the owner of private property taken for public use, and also as to the circumstances under which the final judgment of the highest court of a State in a proceeding instituted to condemn such property for public use may be reviewed by this court."

. . .

(Pp. 233-234)

"But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power his act is that of the state.' "

. . .

(P. 235)

"If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of the constitution."

. . .

(Pp. 236-237)

"The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

. . .

(Pp. 241-242)

"The owner of private property taken under the right of eminent domain obtains just compensation if he is awarded such sum as, under all the circumstances, is a fair and full equivalent for the thing taken from him by the public."

See also, *Norwood v. Baker*, 172 U.S. 269, 43 L. Ed. 443, 19 S. Ct. 187 (1898) to the same effect, where a street was opened through a parcel of property and the costs of

the acquisition were assessed against the remaining property in accordance with a statutory formula which had no necessary relationship to the benefits received from the opening of the street.

This Court has continuously held since these early cases that the provisions of the Fifth Amendment are applicable to the states by virtue of the Fourteenth Amendment.

In *United States v. Fuller*, 409 U.S. 488, 35 L. Ed. 2d 16, 93 S. Ct. 801, this Court noted on page 490:

> "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124; 94 L. Ed. 707, 70 S. Ct. 547 (1950), as it does from technical concepts of property law."

While there can be no dispute as to the right of a property owner to be compensated where his property has been taken for public use, the question as to whether there has in fact been a "taking" for public use occasionally causes difficulty. Thus, in *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979), where the waters of a privately developed marina were made available for use by the public, this Court held that there had been a "taking" for public use. There, this Court observed at 62 L. Ed. 2d, page 343:

> "As was recently pointed out in *Penn Central Transportation Co. v. City of New York*, 46 USLW 4856 (1978), this Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons.' Id., at 4862. Rather, it has examined the 'taking' question by engaging in essentially ad hoc,

> factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance."

In a footnote on page 872, in *United States v. Sioux Nation of Indians*, ... U.S. ...., 65 L. Ed. 2d 844, it is stated:

> "Here there is no doubt that the Black Hills were 'taken' from the Sioux in a way that wholly deprived them of their property rights to that land."

See also:

Almota Farmers Elev. & Whse. Co. v. United States, 409 U.S. 470, 35 L. Ed. 2d 1, 93 S. Ct. 791 (1973), where a lessee of property was held entitled to compensation for the value of improvements placed on leasehold property and there was a reasonable probability that the lease would be renewed.

II.

Petitioner's Property Has Been "Taken" for Public Use Without the Payment of Just Compensation.

There is no question but that 3.8 acres of land formerly owned by Petitioner is now devoted to a public use. A major boulevard, Tropicana Avenue, extending from Las Vegas Boulevard on the east to Interstate Highway 15 on the west, has been constructed over this parcel. Petitioner has received neither the fair market value of this 3.8 acre parcel nor the monetary equivalent of the consideration that had been promised to her by Clark County's officials for this property. This deprivation of just compensation is the direct result of the inconsistent rulings made by the Supreme Court of the State of Nevada which have effectively deprived her of any remedy for this taking.

The particular formula to be applied in determining the just compensation is probably not too critical. At the first trial the 3.8 acres were valued as a part of the property being acquired. In the last trial it was assumed that the just compensation would be the difference between the fair market value of Mrs. LoBue's property if improved in the manner promised by Clark County and its value without such improvements. This difference was found to be $307,432.00.

The Supreme Court could have directed that the damages for the breach of contract were to be ascertained in the eminent domain proceeding, by instructing the trial court to value the LoBue property as if it had been improved by Clark County in the manner represented before the eminent domain action was filed. Such a procedure would undoubtedly have resulted in a substantially greater award for the 5.19 acres taken and the severance damages resulting from the taking and the construction of the improvement of the freeway.

Obviously, Petitioner has been deprived of 3.8 acres of valuable property or of a property right, considering the contractual obligation as an interest in property, without the just compensation mandated by the state and federal constitutions. However, because of the tortuous progress of this case through the courts, it is not immediately apparent how this has been accomplished.

Petitioner in the first trial was awarded just compensation for the 3.8 acres as a part of the property being taken. Even though this procedure minimized the damages which might have been payable for the breach of contract, since she was entitled to the benefit of the bargain, it did provide substantial justice, since she was given the monetary equivalent of the consideration which she had given to Clark County. However, this judgment was reversed on a technical rule of conveyancing. In reversing, the Supreme Court ordered

that the action in eminent domain be separated from the action for the breach of contract. This order of separation precluded Petitioner from establishing in the trial of the eminent domain proceeding any enhancement in the value of her property resulting from the improvements that had been promised by Clark County. It also precluded her from establishing that her property had sustained damage resulting from her loss of access to Tropicana Avenue and Industrial Road and the loss of surface frontage on Industrial Road. In fact, the State was permitted to argue that these highways added little value to the property because they were merely "paper roads". The necessary result was that Petitioner received less in the second eminent domain proceeding than she did in the first.

When the breach of contract portion of the case came to trial, the order of separation again caused a problem because after the jury had found that Petitioner had been damaged in the sum of $307,432.00, the trial court indulged in some speculation whether Petitioner had received any portion of the damages in the eminent domain portion of the case, concluding that there was an overlapping in the damages in the sum of $57,134.84, thereby reducing the damages to $249,297.16. Then, on appeal, the Supreme Court of Nevada concluded that Petitioner was not entitled even to this amount *on the theory that the doctrine of collateral estoppel applied even though Petitioner had been precluded by the Court's own order from establishing in the eminent domain proceeding any portion of the damages which could be attributable to the breach of contract.*

Further on appeal the Supreme Court of Nevada concluded that Mary LoBue's amended counterclaim for damages did not allege that the expected benefit from the bargained for county roads would have been greater than the benefit actually received from the construction by the State

of the freeway and Tropicana Avenue, resulting in damage, which effectively ignored the Court's own rule N.R.C.P. Rule 15(b) then in effect (Appendix "H").

The Court in reaching this conclusion apparently misread the record. Petitioner in her amended counterclaim did not ask for damages merely for the loss of access to the promised roads, but also asked for damages for the 4.18 acres of land that she had conveyed. The pleading, however, was irrelevant because it was superseded by a pretrial order which resulted in the case being presented to the jury under instructions that they were to determine the value of Petitioner's remaining property, "with the roads constructed as promised, as of September 6, 1962," and what the property would be worth, "without the benefit of the roads constructed as promised as of September 6, 1962."

The Court was also incorrect in stating, "The roads promised by the County in 1957, eventually were constructed by the State in 1966." Petitioner did not bargain for an elevated, limited access freeway and a Tropicana Avenue improved as part of an off- and on-ramp to the freeway. This distinction was noted by the trial court in denying the State's motion for a new trial:

> "The State also contends that any beneficial effects that defendant derived from the State's construction of the freeway should have been considered in the measure of damages. The error of the State's argument, however, lies in the fact that the State did not construct the freeway in performance of its contract with Mrs. LoBue. Rather, Mrs. LoBue would have received the benefit of the freeway even if she had never entered into that contract, the State would have been required to pay her more compensation from the earlier condemnation trial since the State would have had to condemn more acres of Mrs. LoBue's property in order

to construct the freeway, the interchange and Tropicana Avenue. Thus, it would have been unjust and improper to place the benefits of the freeway before the jury, since to have done so would have permitted the State to utilize approximately four (4) acres of Mrs. LoBue's land without paying her any consideration or compensation for that acreage." [Decision and Order, August 21, 1978] (Appendix "G").

In the eminent domain trial Petitioner was limited to a showing that her property was bordered on the north by a 100 foot wide strip of land owned by the State for road purposes. She was not permitted to show that her property was to be valued as if it were bordered on the north by a 100 foot wide highway improved to county standards. Likewise, she was limited to showing that her property bordered on the west on an 80 foot wide parcel owned by the State, which did not extend to either the north or to the south of the LoBue property. She was precluded by the order of the Supreme Court from having her property valued as if it fronted on an 80 foot wide highway carrying traffic to and from the City of Las Vegas to the populated areas of Southern California.

Thus, as found by the trial court, the principles of judicial or collateral estoppel could have no application to this case because the issues in the two trials were required to be different by the manner in which the proceedings had been bifurcated by the orders of the Supreme Court of Nevada. Furthermore, the date of valuation for breach of contract purposes was earlier than the date of valuation fixed in the eminent domain proceeding.

Care was exercised to avoid any overlapping of the damages by the manner in which the issues were tendered to the jury. In the breach of contract trial, the jury was instructed to determine the fair market value of Petitioner's

property assuming that Tropicana Avenue and Industrial Road had been extended and improved as represented by Clark County, and then to subtract from that sum the fair market value of this property without the benefit of this construction but with the assumption that the property bordered on a 100 foot wide parcel and an 80 foot wide parcel granted to and accepted by the County for street and road purposes. Insofar as there were any benefits accruing to Petitioner's property from the construction of the freeway and the improvement of Tropicana Avenue by the State, these benefits were ascertained as special benefits in the eminent domain proceeding and were paid for by Petitioner in the form of a reduction of the severance damages awarded.

Thus, it is clear that as a result of conflicting orders made by the Supreme Court of the State of Nevada, Petitioner has been deprived of just compensation in the amount of $307,432.00 together with interest thereon at seven percent from September 6, 1962, the date of the quitclaim deed which put it beyond the power of Clark County to fulfill its contractual obligation. Such a deprivation violates the just compensation provisions of both the state and federal constitutions.

III.

Because of the Extensive Conversion of Surface Highways Into Freeways Under the Federal-Aid Highways Act the Issue Presented in This Case Is of Nationwide Concern.

The construction of major highways with limited access has given rise to considerable litigation where property fronting on an existing highway is deprived of direct access to the new or reconstructed highway. Many of these cases are collected in an annotation in 42 ALR 3d 13.

Cases involving the special circumstance found in this case, where a state or a political subdivision has entered into a contractual obligation to provide access to or construct particular improvements as consideration for the granting of a right of way, are not numerous. Clearly, if the property is enhanced in value by the existence of such a contractual right, there has been a "taking" for public use if that right is impaired without the payment of just compensation.

Closely analogous to our present case is *State ex rel. Herman v. Schaffer* (1970) 105 Ariz. 478, 467 P. 2d 66, 42 ALR 3d 1. There the State of Arizona, in acquiring the right of way for a state highway, agreed to install and maintain seven crossovers for the benefit of the abutting properties. This highway was reconstructed as Interstate 10, an elevated, limited access highway. The Court held that under its police power the State could limit access to a highway and since frontage roads had been provided, there had been no compensable deprivation of access. However, the Court concluded that the property owner was entitled to damages for breach of contract measured, as here, by the difference in value of the property with and without the promised crossovers. The Court noted:

> "Assuredly, the police power does not give the State authority to make and break contracts with impunity. If the State considers it advantageous to agree to construct and maintain crossovers at the time of taking land as part of the consideration rather than pay the full and just compensation in money, it should not subsequently complain that it is being held to this agreement or to responding in damages for the breach thereof."

The case of *People ex rel. Dept. of Public Works v. Ward* (1968) 258 Cal. App. 2d 15, 65 Cal. Rptr. 508, involved a situation where the State, in connection with the acqui-

sition of property needed for the improvement of a highway interchange, agreed to provide access to the freeway at a particular location. The reconstruction of this highway interchange as a part of the improvement of Interstate 5 necessitated a more circuitous access from the property to the freeway. It was held that the property owner was entitled to compensation for damages resulting from the failure of the State to provide access as promised.

In *People ex rel. Dept. of Public Works v. DiTomaso* (1967) 248 Cal. App. 2d 741, 57 Cal. Rptr. 293, an award of compensation which included damages for a breach of an agreement by the State to construct a road approach was affirmed on appeal. At page 758, the Court noted:

> "It is concluded that the owners were entitled to compensation for the loss of the rights they contracted for under the 1960 agreement, and such other impairment of access was compensable."

In *Department of Public Works & Bldgs. v. Mokres*, 28 Ill. App. 3d 422, 328 N.E. 2d 357 (1975) where, in a deed to the State, an owner reserved a right of access to a highway at a particular location, on the conversion of the highway to a limited access highway, the property owner was held entitled to compensation for the taking of this contractual right.

The right-of-way agents for the State of North Carolina have apparently entered into a number of similar contractual obligations, giving rise to a series of cases where surface roads have been converted into limited access highways. See, for instance:

French v. State Highway Commission (1968) 273 N.C. 108, 159 S.E. 2d 320;

Prestige Realty Co. v. State Highway Commission (1968) 1 N.C. App. 82, 160 S.E. 2d 83 (Interstate 40);

McNeill v. North Carolina State Highway Commission, 4 N.C. App. 354, 167 S.E. 2d 58 (Interstate 95).

A somewhat similar situation was presented in *Foster v. United States* (U.S. Ct. of Cls. 1979) 607 F. 2d 943, where plaintiff's predecessor in interest had granted property to the federal government, reserving "minerals" together with the right of reasonable access to extract such minerals. Plaintiff was held entitled to just compensation where the government's use of the property precluded such entry.

The regulations of the Federal Highway Administration, Department of Transportation, require the consistent and equitable treatment of property owners where property is being acquired for improvement as a Federal-Aid Highway. Therefore, this decision of the Supreme Court of the State of Nevada should not be allowed to stand as a glaring exception to the general rule applicable in other states which allow recovery for the taking of frontage or access rights created by a contract.

Section 712.101, 23 CFR provides:

> "This subpart prescribes Federal Highway Administration (FHWA) policies related to the acquisition function. The intent and purpose of these policies are to assure the establishment of uniform real property acquisition practices to provide consistent, equitable treatment for owners and tenants of real property acquired for Federal and federally assisted highway and highway related projects."

Section 712.103, 23 CFR establishes certain policies which are applicable to states acquiring rights of way for Federal-Aid Highways.

Subdivision (h) provides:

"(h) *Condemnation*. If any interest in real property is to be acquired by exercise of eminent domain, the acquiring agency shall institute formal condemnation proceedings. *No acquiring agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property*." (Emphasis added).

Subdivision (q) provides:

"(q) *Inverse condemnation expenses*. Where an inverse condemnation or similar proceeding is successfully maintained for the taking of real property, the acquiring agency shall pay the owner, as a part of the judgment or settlement, such sum as will in the opinion of the court or the official effecting the settlement, reimburse the owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the proceedings."

Conclusion.

Since it is clear that the Petitioner has been deprived of valuable property or property rights in connection with the construction of an Interstate Highway and a Federal Aid Secondary Highway, this Court should grant certiorari to insure that she receives the just compensation mandated by the Fifth and Fourteenth Amendments of the United States Constitution and the policies adopted by the Federal Highway Administration.

Dated: March 5, 1981.

Respectfully submitted,

THOMAS A. FOLEY of
FOLEY BROTHERS LAW OFFICES,
Attorneys for Petitioner.

APPENDIX A.

Judgment on the Verdict.

Case No. A-368. Department No. VI. In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

The State of Nevada, on relation of its Department of Highways, Plaintiff, vs. Mary LoBue, an unmarried woman, owner as sole and separate property, Defendant.

The above entitled cause came on regularly for trial in Department VI of the above entitled court, the Honorable HOWARD W. BABCOCK, Judge presiding, the Attorney General of the State of Nevada appearing by and through Robert A. Callaway, Esq., attorney for plaintiff, and Ned R. Nelsen and Foley Brothers by and through Ned R. Nelsen and Thomas A. Foley appearing as attorneys for defendant, a jury of eight persons having been regularly impaneled and sworn to try said action, and said action having been bifurcated for trial, the first phase of which having been duly and regularly tried commencing on May 8, 1978, and ending May 12, 1978, witnesses on behalf of plaintiff and defendant having been sworn and examined and documentary evidence adduced; after hearing the evidence, the arguments of counsel, and the instructions of the court, the jury retired to consider their verdict and subsequently returned into said court at 9:15 p.m. on May 12, 1978, and upon their return into court and the court having found all to be present and in their places, inquired of said jurors whether or not they had reached a verdict, whereupon the foreman of said jury returned into court the following verdict:

> "We, the Jury, and not less than three-fourths of our number, or six, find the fair market value of MARY LO BUE's property, with the roads constructed as promised, as of September 6, 1962, to be, as follows:

$1,145,882.

"We further find that the fair market value of MARY LO BUE's property, without the benefit of the roads constructed as promised as at September 6, 1962, to be as follows:

$838,450.

"Dated this 12 day of May, 1978.

Ralph H. Gordon, Foreman"

whereupon, by virtue of the law and by reason of the premises aforesaid and said verdict, said verdict was filed in open court on May 12, 1978, at 9:30 p.m.

Whereupon, the second phase of the above entitled cause came on regularly for trial before Department VI of the above entitled court, the Honorable HOWARD W. BABCOCK, Judge presiding, the Attorney General of the State of Nevada appearing by and through Robert A. Callaway, Esq., attorney for plaintiff, and Ned R. Nelsen and Foley Brothers by and through Ned R. Nelsen, Esq. and Thomas A. Foley, Esq. appearing as attorneys for defendant, the same jury having been regularly impaneled and sworn to try said action for the first phase continued in the second phase in said action commencing on May 15, 1978, and ending on May 18, 1978, witnesses on behalf of plaintiff and defendant having been sworn and examined and documentary evidence adduced; after hearing the evidence, the arguments of counsel, and the instructions of the court, the jury retired to consider their verdict and subsequently returned into court at 6:10 p.m. on May 18, 1978, and upon their return into court and the court having found all to be present and in their places, inquired of said jurors whether or not they had reached a verdict, whereupon the foreman of said jury returned into court the following verdict:

"We, the jury, and not less than three-fourths of our number, or six, find the fair market value of Mary

LoBue's 16.56 acres, with 878 feet of frontage along a fully improved Tropicana Avenue, as of September 6, 1962, to be as follows:

$504,958.

"We further find that the fair market value of Mrs. LoBue's 16.56 acres, as of September 6, 1962, without the benefit of the construction of Tropicana Avenue, to be in the sum of $468,889.

"We further find that from the severance damages awarded Mrs. LoBue in 1967 in the sum of $93,777.97, there should be allocated to the loss of right to access along 400 feet of Industrial Road; the loss of the right to access along 1492 feet on Tropicana Avenue; and the loss of the corner created by the proposed intersection of those two streets, the sum of $27,246.86.

"We further find that from the special benefits previously assessed against Mrs. LoBue in 1967 in the sum of $38,904.17 there should be allocated to the construction of the curbs and paving along 878 feet on Tropicana Avenue, the sum of $21,500.

"DATED this 18 day of May, 1978.

Ralph H. Gordon, Foreman"

whereupon, by virtue of the law and by reason of the premises aforesaid and said verdict, said verdict was filed in open court on May 18, 1978, at 6:10 p.m.

At the commencement of the second phase, one of the issues was settled by a stipulation between counsel and approved by the court. Said issue related to the repayment to the plaintiff State for the 15,999 square feet, being that 40 × 400 foot strip at the rear of the Defendant Lo Bue's property. The jury, by Instruction No. 17, was instructed:

"You are, therefore, advised that the court will deduct the sum of $16,318.98 from your verdict in the first phase as an offset. This amount is repayment to the

State at the rate of $1.02 per square foot for the 15,999 square feet, being that 40 × 400 foot strip at the rear of Mrs. LoBue's property, being the most Westerly portion thereof."

WHEREFORE, by virtue of the law and by reason of the premises aforesaid and said verdicts, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That defendant MARY LO BUE was damaged in the sum of Three Hundred Seven Thousand Four Hundred Thirty-two Dollars ($307,432) by reason of the failure of the County of Clark to construct Bond Road (now known as Tropicana Avenue) and Industrial Road as promised.

2. That defendant MARY LO BUE received the benefit of 878 feet of frontage along a fully improved Tropicana Avenue as of September 6, 1962 in the amount of Thirty-six Thousand Sixty-nine Dollars ($36,069), being the difference in Items 1 and 2 of the verdict of May 18, 1978, which sum should be subtracted from Three Hundred Seven Thousand Four Hundred Thirty-two Dollars ($307,432).

3. That defendant MARY LO BUE has been paid for the loss of the right to access along 400 feet of Industrial Road; the loss of the right to access along 1492 feet on Tropicana Avenue; and the loss of the corner created by the proposed intersection of those two streets in the sum of Twenty-seven Thousand Two Hundred Forty-six and 86/100 Dollars ($27,246.86), which sum should be subtracted from Three Hundred Seven Thousand Four Hundred Thirty-two Dollars ($307,432).

4. Pursuant to the stipulation of counsel, approved by the court, the Plaintiff STATE is repaid at the rate of $1.02 per square foot for the 15,999 square feet, being that 40 × 400 foot strip at the rear of Defendant MARY LO BUE's property, being the most Westerly portion thereof, in the sum of Sixteen Thousand, Three Hundred Eighteen Dollars

and ninety-eight one hundredths cents ($16,318.98) which sum should be subtracted from the Three Hundred Seven Thousand Four Hundred Thirty-two Dollars ($307,432).

5. That defendant MARY LO BUE has previously been assessed for the special benefits accruing to her property by reason of the construction of the curbs and paving along 878 feet on Tropicana Avenue in the sum of Twenty-one Thousand Five Hundred Dollars ($21,500), which sum should be added to the sum of Three Hundred Seven Thousand Four Hundred Thirty-two Dollars ($307,432).

6. That defendant MARY LO BUE have and recover from plaintiff STATE the sum of Two Hundred Forty-nine Thousand Two Hundred Ninety-seven Dollars and sixteen one-hundredths cents ($249,297.16) by reason of the credits and deductions set forth in Paragraphs 1, 2, 3, 4 and 5 above in pursuance to the specific verdicts hereinabove set forth; and, in addition thereto, interest at the rate of Seven Per Cent (7%) per annum on Two Hundred Forty Nine Thousand Two Hundred Ninety-seven Dollars and sixteen one-hundredths cents ($249,297.16) from September 6, 1962 to the date hereof, being the amount of _____ ($ _____)and that said interest at Seven Per Cent (7%) per annum on the sum of _____ ($ _____) shall accrue to the benefit of Defendant MARY LO BUE until this Judgment on Verdict is satisfied.

Dated the ____ day of June, 1978.

HOWARD W. BABCOCK
District Judge

APPROVED AS TO FORM:
HONORABLE ROBERT LIST, Attorney General
Department of Highways
By ROBERT CALLAWAY, Deputy
NED R. NELSEN & FOLEY BROTHERS
By THOMAS A. FOLEY

APPENDIX B.

Opinion.

In the Supreme Court of the State of Nevada.

The State of Nevada ex rel. Department of Highways, Appellant and Cross-respondent, vs. Mary LoBue, Respondent and Cross-appellant. No. 11321.

Filed: June 4, 1980.

Appeal and cross-appeal from final judgment entered on jury verdict; Eighth Judicial District Court, Clark County; Howard W. Babcock, Judge.

Reversed with direction to enter judgment for the State.

RICHARD BRYAN, Attorney General, and ROBERT A. CALLOWAY, Deputy Assistant Counsel, Department of Highways,
for Appellant and Cross-Respondent.

FOLEY BROTHERS, of Las Vegas, and NED R. NELSEN, of Los Angeles, California,
for Respondent and Cross-Appellant.

Per Curiam:

This cause twice has been remanded to determine damages, if any, owed LoBue by the State. State ex rel. Dep't Hwys. v. LoBue, 83 Nev. 221, 427 P.2d 639 (1967); LoBue v. State ex rel. Dep't Hwys., 92 Nev. 529, 554 P.2d 258 (1976). On this appeal and cross-appeal each party complains of the manner in which the trial court permitted the jury to determine damages.

In 1957 LoBue unconditionally deeded land to Clark County upon representations that the County would build two roads along the northerly and westerly sides of her remaining property. No representations were made as to the

width or quality of those roads. LoBue expected that the construction of those roads would enhance the value of her remaining property. The roads promised by the County in 1957, eventually were constructed by the State in 1966.[1] The road along the northern part of her property is Tropicana Avenue, and a freeway was constructed along the westerly side of her property.

In our first opinion, State ex rel. Dep't Hwys. v. LoBue, 83 Nev. 221, 427 P.2d 639 (1967), we held that LoBue's remedy for the failure to construct the roads was an action at law for damages. We did not know whether she had sustained damage. We stated: "We express no opinion on the point of damages. Perhaps the highway construction by the State benefited LoBue as much as the originally planned county roads; perhaps not." Id. at 226. That expression was reaffirmed in LoBue v. State ex rel. Dep't Hwys., 92 Nev. 529, 554 P.2d 258 (1976).

The benefit for which LoBue had bargained was the increased value of her land by reason of the promised county roads. Those roads were not constructed. In lieu thereof, the State subsequently constructed a freeway and Tropicana Avenue. Our prior opinions had advised the trial court that the measure of damages was the value of the benefit expected by LoBue less the value of the benefit received. Indeed, we noted that she may not have sustained damage; that she may have received more than she had bargained for. See concurring opinion, Zenoff, State ex rel. Dep't Hwys. v. LoBue, 83 Nev. 221, 427 P.2d 639 (1967).

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[1]In 1971 an issue arose as to whether the State was obliged to defend LoBue's claim for damages originally asserted against Clark County, the State's predecessor in interest. We ruled that the State was obliged to defend. LoBue v. State ex rel. Dep't of Hwys., 87 Nev. 372, 487 P.2d 506 (1971).

Her amended counterclaim for damages, however, did not allege that the expected benefit from the bargained for county roads would have been greater than the benefit actually received from the construction by the State of the freeway and Tropicana Avenue, resulting in damage. What she did claim was damage by reason of the loss of frontage and access along the northerly and westerly boundaries of her property and the loss of a corner at that intersection.

This particular claim of damage previously had been litigated in the second condemnation trial. At that trial the jury specifically was instructed to determine the damages sustained by LoBue for the loss of frontage and access along the northerly and westerly boundaries of her property and for the loss of the corner. That damage was assessed at $93,777.97. From that amount was deducted the sum of $38,904 representing the benefits LoBue received from the State's construction of the freeway and Tropicana. Judgment was entered on that verdict and has been paid by the State. It is conclusive upon the parties and not subject to relitigation. Clark v. Clark, 80 Nev. 52, 389 P.2d 69 (1964).

The issues of judicial estoppel and collateral estoppel, and the doctrine of Clark v. Clark, supra, were presented to this court on the last appeal of this case. Had we resolved those issues the trial we are now reviewing on the amended counterclaim would not have occurred. Apparently, our failure to do so caused the trial judge to believe that those doctrines did not bar the damages sought by the amended counterclaim. We did not intend that interpretation of our opinion.

Since LoBue does not claim that the expected benefit from the bargained for county roads would have been greater than the benefit actually received from the construction of the freeway and Tropicana, and since she already had been compensated for the damage she does claim, we reverse the

judgment entered upon jury verdict, and remand with direction to enter judgment for the State upon LoBue's counterclaim for damages.

/s/ MOWBRAY, *C. J.*
Mowbray

/s/ THOMPSON, *J.*
Thompson

/s/ GUNDERSON, *J.*
Gunderson

/s/ MANOUKIAN, *J.*
Manoukian

/s/ BATJER, *J.*
Batjer

Attest: A full, true and Correct Copy.
C. R. Davenport, Clerk of the Supreme Court
By /s/ JUDITH McCULLOCH
Deputy.

APPENDIX C.

Order Denying Rehearing.

In the Supreme Court of the State of Nevada.

The State of Nevada ex rel. Department of Highways, Appellant and Cross-Respondent, vs. Mary LoBue, Respondent and Cross-Appellant. No. 11321.

Filed: Dec. 30, 1980.

Rehearing denied. NRAP 40(c)(1).

It is so ORDERED.

/s/ MOWBRAY, *C. J.*
Mowbray

/s/ THOMPSON, *J.*
Thompson

/s/ GUNDERSON, *J.*
Gunderson

/s/ MANOUKIAN, *J.*
Manoukian

/s/ BATJER, *J.*
Batjer

cc: Hon. Richard H. Bryan, Attorney General
Robert A. Callaway, Deputy Attorney General
Ned. R. Nelsen, Esq.
Thomas A. Foley, Esq.
Foley Brothers, Esqs.

APPENDIX D.

Opinion.

The State of Nevada, on Relation of Its Department of Highways, Appellant, v. Mary LoBue, Respondent. No. 5228. May 18, 1967. 427 P.2d 639.

Appeal from judgment of the Eighth Judicial District Court, Clark County; George E. Marshall, Judge.

Condemnation case. From an award entered by the lower court the state appealed. The Supreme Court, THOMPSON, *C. J.*, held that where grantor by unconditional grant deed conveyed to county, which made an unconditional acceptance, and where the underlying consideration, given sincerely and innocently in the belief that it would be fulfilled, failed, grantor could not sue in equity to cancel deed but was left only to an action at law for damages.

Judgment reversed and cause remanded.

[Rehearing denied June 29, 1967].

Harvey Dickerson, Attorney General, Carson City, and *Melvin L. Beauchamp*, Deputy Attorney General, for Appellant.

Foley Brothers, of Las Vegas, and *Cooper and Nelsen* of Los Angeles, California, for Respondent.

1. Counties.

   Evidence in condemnation case sustained findings that grantor was induced to execute deed to county because of representations by authorized agents of county that her remaining property would be benefited by having 2900 feet of additional frontage along the roads to be constructed by the county, that representations were sincerely and innocently made in the belief that they would be fulfilled, that county did not build roads, that consideration for conveyance failed and that

grantor did not intend gift or a dedication of the land for public use.

2. Deeds.

Mere statement of use to which land conveyed is to be devoted, and in consideration of which conveyance is made, does not subject estate transferred to a condition subsequent. NRS 111.170.

3. Cancellation of Instruments.

Failure of consideration for unconditional grant deed, without more, does not justify equitable relief, and grantor's remedy when bargained for consideration fails is an action at law for damages.

4. Deeds.

Conveyance in consideration of promise to support grantor is treated differently than an ordinary commercial conveyance.

5. Cancellation of Instruments.

Where grantor by unconditional grant deed conveyed to county, which made an unconditional acceptance, and where underlying consideration, given sincerely and innocently in the belief that it would be fulfilled, failed, grantor could not sue in equity to cancel deed but was left only to an action at law for damages.

OPINION

By the Court, THOMPSON, *C. J.*:

This is a condemnation case commenced by the State against Mary LoBue to acquire two separate parcels of land (5.19 acres) in Clark County for interstate highway purposes. Sometime before trial the parties, through counsel, stipulated that the ownership of another parcel of land (3.80 acres) to which the State held record title adverse to LoBue's claim of ownership, could be decided by the Court in this

litigation.[1] It was understood that if the court found for LoBue the scope of the condemnation case would be enlarged to embrace all of the land, that is 8.99 acres, and the cause then tried to a jury to find just compensation and assess severance damages. On the other hand, should the court rule for the State, the disputed parcel would not be included in the condemnation jury trial. The case thus became a bifurcated affair—the first dispute, an equitable proceeding, to be resolved by the court; and the second, the condemnation case, to be decided by a jury.

The district court ruled that LoBue was the owner of the disputed land, and, in effect, cancelled the deeds through which the State had acquired title. Consequently all three parcels totalling 8.99 acres were included in the jury trial which followed. The jury awarded LoBue $548,525 as just compensation for the property taken; $108,205 severance damages; and found that the remainder of some of her property was benefited by the highway to the extent of $5,000. A judgment for $651,730 with interest then accrued of $127,567.40 was duly entered. This appeal by the State ensued.

The main claim of error is addressed to the court's finding that LoBue was the owner of the disputed acreage to which the State held record title. Since the jury returned a lump sum verdict for all of the property condemned ($548,525) without assessing compensation for each parcel separately, and as the failure to segregate by parcel likewise affects the lump sum severance damages awarded, this assigned error,

---

[1]On March 4, 1957 LoBue, by grant deed, had conveyed the disputed acreage to Clark County. On September 6, 1962 the County, by quitclaim deed, conveyed its title to the State. The stipulation provided, inter alia, that Clark County need not be joined as a party to the litigation and that LoBue could assert against the State all rights and remedies that she may have had against Clark County.

if sustained, requires a reversal of the entire case. It is our opinion that the ruling below vesting ownership of the disputed parcel in LoBue, thus subjecting that parcel to the condemnation suit, was clearly erroneous. Therefore, we reverse and remand for another trial to determine just compensation, severance damages, and benefits, if any, due to the State's condemnation of the two parcels totalling 5.19 acres. The disputed parcel (3.80 acres) is removed from this litigation and the State's title thereto confirmed.

[Headnote 1]

On March 4, 1957 LoBue, by grant deed, conveyed the disputed parcel (3.80 acres) to Clark County. The County Commissioners, by resolution, accepted the conveyance unconditionally and recorded the deed. On September 6, 1962 Clark County conveyed its title to the State. The trial court made the following relevant findings: That LoBue was induced to execute the deed to the County because of representations by authorized agents of the County that her remaining property would be benefited by having 2900 feet of additional frontage along the roads to be constructed by the County; that the representations were sincerely and innocently made by the County agents in the belief that they would be fulfilled; that the County did not build the roads; that the consideration for the conveyance failed; and that LoBue, as grantor, did not intend a gift or a dedication of the land for public use. As we read the record each finding is supported by substantial evidence.

[Headnote 2]

We turn first to examine the grant deed. It is unconditional in form. The words used are: "* * * the undersigned grantor does hereby grant, bargain, sell and convey to Clark County, Nevada, for street and road purposes, all of the following described land * * *." Those words do not provide for

termination of the estate conveyed upon the occurrence or non-occurrence of a specified event. It is well settled that a mere statement of the use to which the land conveyed is to be devoted, and in consideration of which the conveyance is made, does not subject the estate transferred to a condition subsequent. I Rest. Prop. Sec. 45, p. 143; 3 Powell, Real Property, p. 143; Greene v. O'Connor, 25 A. 692 (R.I. 1892); Fuchs v. Reorganized School Dist., 251 S.W.2d 677 (Mo. 1952); Gramer v. City of Sacramento, 41 P.2d 543 (Cal. 1935); Booth v. Los Angeles County, 12 P.2d 72 (Cal.App. 1932): See also NRS 111.170 [where it is provided that the words "grant, bargain and sell" are used to convey an estate in fee simple unless restrained by express terms contained in the deed]. Additionally, we note that the deed does not provide for reverter to or re-entry by the grantor.

The acceptance of the deed by the County was likewise unconditional. [Cf. State ex rel. Dep't of Hwys. v. Wells Cargo Inc., 82 Nev. 82, 411 P.2d 120 (1966) where Clark County accepted a grant deed from Wells subject to a condition—the right of Wells to encroach upon the property conveyed where Wells' weighing installations were located —and the Court held that Wells had retained an easement which was compensable in an eminent domain proceeding.] Thus, an absolute, unconditional transfer of title occurred when LoBue made and delivered her grant deed to Clark County.

The consideration for that conveyance failed. Clark County did not construct the roads. That failure, however, was not accompanied by fraud or bad faith on the part of the County. The County acted in good faith in making its representations. Apparently it did not complete the road project because the State's proposed highway plan rendered the County project unnecessary.

[Headnote 3]

The State's claim of error centers on the proposition that failure of consideration for an unconditional grant deed, without more, does not justify equitable relief. Fraud in the inception of the transaction, or some kindred circumstance, must exist before recission or cancellation is in order. Abundant case authority sustains this contention. Desert Centers, Inc. v. Glen Canyon, Inc., 356 P.2d 286 (Utah 1960); Williams v. Sullivan, 138 S.E.2d 368 (Ga. 1964); City of Cleveland v. Herron, 131 N.E. 489 (Ohio 1921); Suburban Properties, Inc. v. Hanson, 382 P.2d 90 (Ore. 1963); Hewett v. Dole, 124 P. 374 (Wash. 1912); Miller v. Village of Brookville, 89 N.E.2d 85 (Ohio 1949); Lawrence v. Gayetty, 20 P. 382 (Cal. 1889); Borden v. Boyvin, 130 P.2d 718 (Cal.App. 1942); Norby v. Pister, 250 P.2d 633 (Cal.App. 1952). The grantor's remedy when the bargained for consideration fails and a reason for equitable relief is not present, is an action at law for damages.

[Headnote 4]

LoBue acknowledges the law as we have stated it but insists that Nevada has adopted a different rule; that failure of consideration, without more, will, in this State, allow equity to intervene and cancel a deed. Kerr v. Church, 74 Nev. 264, 329 P.2d 277 (1958). Though it is true that in Kerr this court affirmed a decree cancelling a deed upon the ground that the consideration therefor failed, we think that case properly falls within a well established exception to the rule we have just related. The prevailing view in this country favors the recission of a deed if the grantee fails to perform his promise to support the grantor. The essence of Kerr was the failure of the grantee to allow the grantor, during his lifetime, to jointly use the home which was the subject of the deed. Clearly this was a form of support. The

rationale underlying the "support exception" varies: inadequacy of the legal remedy (Ford v. Ford, 43 N.E.2d 756 (Ohio 1942)); theory of a breach of a condition subsequent (Nadler v. Nadler, 8 N.W.2d 306 (Wis. 1943)); the failure to support raises a presumption of fraud at the inception of the transaction (DaCosta v. Bischer, 122 N.E. 819 (Ill. 1919)); (Sethmann v. Bulkley, 61 P.2d 765 (Cal. 1936)); and, the mere failure of consideration (Martinez v. Martinez, 141 P. 469 (Colo. 1914)). Whatever the reason assigned, it is clear that a conveyance in consideration of a promise to support the grantor is treated differently than an ordinary commercial transaction. Comment: 9 U.Pitt.L.Rev. 206 (1948); annot. 112 A.L.R. 670.

In addition to the Kerr case our attention is directed to the decision of Russell v. Ruffcorn, 54 Nev. 162, 10 P.2d 632 (1932) where, on appeal, the court directed cancellation of a deed because the consideration therefor failed. In that case, however, the parties had also executed a contract which provided that the deed was to be accepted as part payment for stock held in escrow pursuant to a conditional permit of the Commissioner of Corporations of California under which the stock was not to be sold without the written consent of the Commissioner. His consent was not secured, though both parties to the agreement, at the time it was entered into, apparently believed that no difficulty would be experienced in obtaining the Commissioner's consent—a mutual mistake. That circumstance, coupled with the failure of consideration, led the court to decree equitable relief. Such additional factors are not present in the case at hand. [Headnote 5]

We conclude that, in these circumstances, the grantor's (LoBue) remedy for the failure of Clark County to construct the roads is an action at law for damages; not a suit in equity

to cancel the deed. The reason for withholding equitable relief is the need for preserving the finality of a deed and the integrity of title to real property. This can best be accomplished by limiting to grantor to the remedy of damages. We express no opinion on the point of damages. Perhaps the highway construction by the State along the disputed parcel benefited LoBue as much as the originally planned County roads; perhaps not. That question was not presented to the trial court for decision.

For the reasons expressed the judgment below is reversed and the cause remanded.

COLLINS, *J.*, concurs.

ZENOFF, *J.*, concurring:

The peculiar circumstances surrounding the execution of the grant deed for road purposes captured more than my usual interest because I was the trial judge in State ex rel. Dept of Hwys. v. Wells Cargo, Inc., 82 Nev. 82, 411 P.2d 120 (1966). Initially, I did not see the distinction between the subject of the deed in this case from the execution of the deed to the county in the Wells case. It seems clear now that Mr. Justice Badt found that in Wells the trial judge was correct in his conclusion, though not in the way in which he arrived at it.

In this case, LoBue gave the deed for street and road purposes in return for a promise that a road would be constructed along the remainder of the property. An interstate highway was built on the property, though not by the promising party and not to the same specifications as originally promised. Yet, not only was the promise kept but the road is a much more travelled artery as an interstate highway than as a county road. It is reasonably probable that respondent received even more than bargained for.

APPENDIX E.

Judgment of Condemnation on Verdict.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark. No. A-368.

The State of Nevada, on relation of its Department of Highways, Plaintiff, vs. Mary LoBue, an unmarried woman, Owner as sole and separate property; Pioneer Title Insurance Company of Nevada, a Nevada corporation, Trustee; Harry Sosin and Beatrice Sosin, Beneficiaries; Samuel Glatzer and Mollie Glatzer, Beneficiaries; Harry Kosack and Sophie Kosack, Beneficiaries; Pioneer Title Insurance Company of Nevada, a Nevada corporation, Trustee; Rose Pickman, a widow, Beneficiary; Clarence Sobole and Mary Sobole, Beneficiaries; and any and all other persons or parties not specifically mentioned having rights, title or interests therein; Defendants.

WHEREAS, the above-entitled cause first came on for trial before this Court, Department No. 4, on the 19th day of July, 1966, and judgment pursuant to verdict was duly entered, adjudging and decreeing that Defendant, Mary LoBue, have and recover from said Plaintiff the sum of SIX HUNDRED FIFTY ONE THOUSAND, SEVEN HUNDRED THIRTY AND NO/100 DOLLARS ($651,730.00), and in addition thereto interest at the rate of seven percent (7%) per annum on SIX HUNDRED SEVENTEEN THOUSAND, ONE HUNDRED EIGHTY AND NO/100 DOLLARS ($617,180.00) from April 26, 1963, to April 4, 1966, being in the amount of ONE HUNDRED TWENTY SEVEN THOUSAND, FIVE HUNDRED SIXTY SEVEN AND 40/100 DOLLARS ($127,567.40) and that said interest at seven percent (7%) per annum on the sum of SIX HUNDRED SEVENTEEN THOUSAND, ONE HUNDRED EIGHTY AND NO/100 DOLLARS ($617,180.00 continued to accrue

to the benefit of Defendant until the final judgment was satisfied; and

WHEREAS, the Plaintiff pursuant to said judgment deposited into Court SIX HUNDRED SEVENTEEN THOUSAND, ONE HUNDRED EIGHTY AND NO/100 DOLLARS ($617,180.00), having heretofore deposited THIRTY FOUR THOUSAND, FIVE HUNDRED FIFTY AND NO/100 DOLLARS ($34,550.00) pursuant to Order for Immediate Occupancy and ONE HUNDRED TWENTY NINE THOUSAND, SIX HUNDRED SEVEN AND 81/100 DOLLARS ($129,607.81) as interest on said sum of SIX HUNDRED SEVENTEEN THOUSAND, ONE HUNDRED EIGHTY AND NO/100 DOLLARS ($617,180.00) to the date of deposit, August 9, 1966, making a total amount deposited of SEVEN HUNDRED EIGHTY ONE THOUSAND, THREE HUNDRED THIRTY SEVEN AND 81/100 DOLLARS ($781,377.81) in satisfaction of said judgment; and

WHEREAS, the Supreme Court of the State of Nevada in its Opinion No. 5228, filed May 18, 1967, reversed and remanded said cause for a new trial; and

WHEREAS, the above-entitled cause came on for a retrial before this Court, Department No. 6, on the 18th day of September, 1967, the Attorney General of the State of Nevada appearing by and through Deputy Attorney General Melvin L. Beauchamp, Esq., attorney for Plaintiff, and Cooper and Nelsen and Foley Brothers, Esqs., by and through Ned R. Nelsen and Thomas A. Foley, Esqs., appearing as attorneys for Defendant Mary LoBue, a jury of twelve (12) persons having been regularly impaneled and sworn to try said action, and said action having duly and regularly been tried commencing on the 18th day of September, 1967, and ending on the 29th day of September, 1967, witnesses on behalf of Plaintiff and Defendant having

been duly sworn and examined and documentary evidence adduced; after having heard all of the testimony and the argument of counsel, and receiving the Court's instructions, the jury retired for deliberation and afterwards returned into open Court its verdict in words and figures, as follows, to wit:

"WE, the jury in the above-entitled proceedings, and not less than three-fourths of our number, or nine, find and access as just compensation to the Defendants:

"1. The amount of Two Hundred Thirty Thousand, One Hundred Sixty Six and 06/100 Dollars ($230,166.06) as the value of Parcel 211.1A.

"2. The amount of Six Hundred and 78/100 Dollars ($600.78) as the value of Parcel 211.1B.

"3. The amount of Ninety Three Thousand Seven Hundred Seventy Seven and 97/100 Dollars ($93,-777.97) as severance damages to the remainder of Defendants' property not taken; and

"4. The amount of Thirty Eight Thousand Nine Hundred Four and 17/100 Dollars ($38,904.17) as special benefits to the remainder of Defendants' property not taken.

September 29, 1967 /s/ RICHARD A. AVILA"
Date Foreman

AND WHEREAS, there remains on deposit with the Clerk of the Eighth Judicial District Court, Loretta Bowman, the sum of TWO HUNDRED THOUSAND DOLLARS ($200,000.00) deposited by the Plaintiff, pursuant to the judgement of July 28, 1966 and said sum of TWO HUNDRED THOUSAND DOLLARS ($200,000.00) not having been withdrawn by the Defendant, MARY LO BUE, whereupon by virtue of the law, and by reason of the premises aforesaid and said verdict, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the Plaintiff, the State of Nevada, on relation of its Department of Highways, be and hereby is awarded the relief prayed for in its Complaint, and that the use for which the property is sought to be applied is a public use and that the property is necessary to such public use;

2. That the Plaintiff have judgment condemning for the use of said Plaintiff all those certain lands situated and lying in the County of Clark, State of Nevada, consisting of 5.19 acres, as more particularly described and set forth in said Complaint, reference to which is hereby made;

3. That the Plaintiff, pursuant to NRS 37.170 (3) have and recover from said Defendant, MARY LO BUE, the sum of TWO HUNDRED FORTY TWO THOUSAND, NINE HUNDRED SIXTY EIGHT AND 14/100 DOLLARS ($242,968.14) and in addition thereto interest at the rate of seven percent (7%) per annum on said TWO HUNDRED FORTY TWO THOUSAND, NINE HUNDRED SIXTY EIGHT AND 14/100 DOLLARS ($242,968.14) from August 9, 1966 to October 4, 1967, being in the amount of NINETEEN THOUSAND, SIX HUNDRED EIGHTEEN AND 60/100 DOLLARS ($19,618.60) and that said interest at seven percent (7%) per annum on the sum of TWO HUNDRED FORTY TWO THOUSAND, NINE HUNDRED SIXTY EIGHT AND 14/100 DOLLARS ($242,968.14) continue to accrue to the benefit of Plaintiff until the final judgment is satisfied.

4. That the Clerk of the Eighth Judicial District Court, in and for the County of Clark, State of Nevada, pay to the Plaintiff, the State of Nevada, on relation of its Department

of Highways, the TWO HUNDRED THOUSAND DOLLARS ($200,000.00) now on deposit with said Clerk of the Eighth Judicial District Court.

DATED this 4th day of October, 1967.

HOWARD W. BABCOCK
District Judge

APPENDIX F.

Opinion.

In the Supreme Court of the State of Nevada.

Mary Lo Bue, an unmarried woman, Owner as sole and separate property, Appellant, vs. The State of Nevada, on relation of its Department of Highways, Respondent. No. 8087.

Filed: Sept. 17, 1976.

Appeal from judgment entered in the Eighth Judicial District Court, Clark County; Howard W. Babcock, Judge.

Reversed and remanded.

COOPER & NELSEN; FOLEY BROTHERS, Las Vegas,
for Appellant.

ROBERT LIST, Attorney General; MELVIN L. BEAUCHAMP, Deputy Attorney General, Carson City,
for Respondent.

By the Court, BATJER, *J.*:

This matter has been before this court on two previous occasions, State ex rel Dep't of Highways v. LoBue, 83 Nev. 221, 427 P.2d 639 (1967) and LoBue v. State ex rel Dep't of Highways, 87 Nev. 372, 487 P.2d 506 (1971). The facts have been exhaustively set forth in our earlier opinions and need not be repeated.

In October, 1967, after our remand in State ex rel Dep't of Highways v. LoBue, supra, Mary LoBue filed her amended counterclaim against the State of Nevada seeking to recover alleged damages resulting from Clark County's failure to construct certain roads. In that case the State was granted summary judgment which we reversed and again

remanded for a trial on the question of damages, if any, for breach of contract.

The district court, relying on Hall v. Superior Court, 289 P.2d 431 (Cal. 1955); Glassell v. Hansen, 87 P. 200 (Cal. 1906); Bate v. Marsteller, 43 Cal.Rptr. 149 (Cal.App. 1965); Weightman v. Hadley, 292 P.2d 909 (Cal.App. 1956); took the position that our opinion in State ex rel Dep't of Highways v. LoBue, supra, mandated the placing of the parties in the same position as if the case had never been tried and as a result entered a pretrial order determining (1) that it was necessary for LoBue to prove the contract, its terms, and purported breach; (2) that the measure of damages would be the value of the benefit expected less the value of the benefit actually received; and (3) that under the rule of judicial estoppel LoBue was estopped by the prior condemnation action judgment from asserting she did not receive frontage and access to Tropicana Avenue and Industrial Road and the corner at the intersection of these streets since she claimed she lost such frontage in the prior trial.

As a result of the pretrial order the question of the existence of a contract and whether it had been breached was submitted to the jury. In answer to certain interrogatories the jury returned a verdict finding no contract between LoBue and Clark County. The jury never reached the question of damages.

Appellant now contends that the district court not only erred in its pretrial ruling but also erred by failing to allow one of appellant's witnesses to testify regarding comparable sales. We agree that the district court erred in submitting the issue of the existence of a contract and the question of its breach to the jury. However, because the jury never reached the question of damages appellant was not prejudiced by the district court's refusal to allow testimony re-

garding comparable sales. Way v. Hayes, 89 Nev. 375, 513 P.2d 1222 (1973).

The only issue requiring consideration is the effect of the opinions of this court filed in the two previous appeals. In State ex rel Dep't of Highways v. LoBue, supra at 223-226, we reversed and held: "The disputed parcel (3.80 acres) is removed from this litigation and the State's title thereto confirmed."

". . .

"The consideration for that conveyance failed. Clark County did not construct the roads. That failure, however, was not accompanied by fraud or bad faith on the part of the County. The County acted in good faith in making its representations. . . .

". . .

". . . The grantor's remedy when the bargained for consideration fails and a reason for equitable relief is not present, is an action at law for damages.

". . .

"We conclude that, in these circumstances, the grantor's (LoBue) remedy for the failure of Clark County to construct the roads is an action at law for damages; not a suit in equity to cancel the deed. The reason for withholding equitable relief is the need for preserving the finality of a deed and the integrity of title to real property. This can best be accomplished by limiting the grantor to the remedy of damages. We express no opinion on the point of damages. . . ."

Although the California cases relied upon by the district court applied the general rule that an unqualified reversal by an appellate court remands the case for a new trial and sets at large for readjudication all issues involved, those cases are inapposite because the reversal by this court of

State ex rel Dep't of Highways v. LoBue, supra, was clearly with sufficient direction. Furthermore, the district court neglected to follow, so far as applicable, our previous opinions in this case and thus failed to heed the exception announced in Hall v. Superior Court, supra.

Cases are legion in the various jurisdictions holding that where an appellate court deciding an appeal states a principal or rule of law, necessary to the decision, the principal or rule becomes the law of the case and must be adhered to throughout its subsequent progress both in the lower court and upon subsequent appeal.

"The law of the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969); State v. Loveless, 62 Nev. 312, 315, 150 P.2d 1015, 1016 (1944). Cf. Wright v. Carson Water Co., 22 Nev. 304, 39 P. 872 (1895).

"Where a judgment is reversed by an appellate court, the judgment of that court is final upon all questions deicded and those questions are no longer open to consideration. The Court to which the cause is remanded can take only such proceedings as conform to the judgment of the appellate tribunal." Schulenburg v. Signatrol, Inc., 226 N.E.2d 624, 628 (Ill. 1967); Thomas v. Durchslag, 102 N.E.2d 114, 115 (Ill. 1951). Cf. VanDiest v. VanDiest, 72 Cal.Rptr. 304 (Cal.App. 1968); Shell v. Schmidt, 330 P.2d 817 (Cal.App. 1958).

Upon reading our opinions in State ex rel Dep't of Highways v. LoBue, supra, and LoBue v. State ex rel Dep't of Highways, supra, it is abundantly clear that the only question to be decided on remand was the amount of damages, if any, owed to LoBue by the State. The cause was remanded for but a single purpose. Under the doctrine of the law of

the case the district court erred in permitting the jury to decide whether a contract had been entered into between LoBue and Clark County and whether it had been breached.

This case is again reversed and remanded for further proceedings not inconsistent with this opinion for the sole and single purpose of determining what damages, if any, are owed to Mary LoBue by the State of Nevada.

We do not reach any of the other assignments of error.

/s/ BATJER, *J.*
Batjer

We concur:

/s/ GUNDERSON, *C. J.*
Gunderson

/s/ ZENOFF, *J.*
Zenoff

/s/ MOWBRAY, *J.*
Mowbray

/s/ THOMPSON, *J.*
Thompson

Attest: A full, true and Correct Copy.
C. R. Davenport, Clerk of the Supreme Court
By /s/ JUDITH McCULLICH
Deputy.

APPENDIX G.

Decision and Order.

Case No. A-368. Dept. No. VI. In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

The State of Nevada, on relation of its Department of Highways, Plaintiff, vs. Mary LoBue, an unmarried woman, Owner as sole and separate property, Defendant.

Filed: Aug. 21, 1978.

The above entitled matter came on regularly for trial before a jury on May 5, 1978, to consider the extent of damages, if any, that are owed to defendant Mary LoBue on her counterclaim against the plaintiff, State of Nevada, for breach of contract. The trial concluded on May 18, 1978. The jury found that the defendant's damages were extensive resulting in a total judgment in favor of the defendant in the sum of $249,297.16 plus interest from the date of breach. Thereafter, plaintiff moved this Court for a new trial claiming alleged error by arguing that: 1) It received an unfair trial due to the bifurcation of issues; 2) the Court allegedly applied an inappropriate measure of damages; 3) the jury supposedly speculated at damages; 4) defendant's claim is barred by the doctrine of *res judicata* and collateral estoppel; and, 5) the Court should have allowed the jury to consider the benefit of the freeway.

The Court, having considered argument of counsel, together with the parties points and authorities, and being advised in the premises, is persuaded that plaintiff's motion is without merit and must be denied.

It is clear that since the State was liable to Mrs. LoBue for breach of contract, she was entitled to the benefit of her bargain. That bargain contemplated that in exchange for deeding approximately four (4) acres of land to the County

to be used for highway construction, the property she retained would receive a substantial increase in fair market value when the County completed a dual road system adjacent to that retained property. Therefore, Instruction No. 12, used in the first phase, correctly instructed the jury on the measure of damages. The State's argument that the jury's verdict was based on such factors as reduction in size and double compensation rather than the loss of legitimately expected appreciation in fair market value is totally without merit or foundation.

The State also contends that any beneficial effects that defendant derived from the State's construction of the freeway should have been considered in the measure of damages. The error of the State's argument, however, lies in the fact that the State did not construct the freeway in performance of its contract with Mrs. LoBue. Rather, Mrs. LoBue would have received the benefit of the freeway even if she had never entered into a contract with the County. Furthermore, if she had not entered into that contract, the State would have been required to pay her more compensation from the earlier condemnation trial since the State would have had to condemn more acres of Mrs. LoBue's property in order to construct the freeway, the interchange and Tropicana Avenue. Thus, it would have been unjust and improper to place the benefits of the freeway before the jury, since to have done so would have permitted the State to utilize approximately four (4) acres of Mrs. LoBue's land without paying her any consideration or compensation for that acreage.

The only benefit of the State's construction that should have been considered by the jury as an offset to defendant's damages was properly limited to the State's construction of Tropicana Avenue. Although this claim was somewhat tenuous since the construction was not undertaken in perform-

ance of any contractual duties, nor was it timely tendered as contemplated by the contract, nevertheless, the Court was persuaded to resolve any such doubt in the State's favor since Mrs. LoBue did receive at least part of the benefit of her bargain. With the construction of Tropicana Avenue she received one corner on a road system, as opposed to two, and she did receive a fraction of the frontage that she had bargained for on Tropicana Avenue.

The State's argument that it was prejudiced by the bifurcation of issues is also totally without merit. It is overwhelmingly clear that Mrs. LoBue was entitled to the benefit of her bargain. The State's entitlement to certain offsets and credits, however, is much more tenuous and doubtful. Consequently, it was proper to bifurcate the issues of damages and benefits in order to isolate the clearly meritorious claims from the more tenuous claims. If the Court had not bifurcated the trial, the State would not have been permitted to introduce evidence of any benefits that may have resulted from its construction. Therefore, the State benefited from the bifurcation rather than being prejudiced by it.

Although there is arguable merit to the State's position that the jury was wrongfully permitted to speculate at assessments and benefits by inquiring into another jury's verdict, again, the State benefited rather than being prejudiced by that aspect of the trial. If inquiry had not been made into another jury's verdict, then the defendant's judgment against the State would have been $22,065.84 greater.

Although it is unorthodox to inquire into another jury's verdict, nevertheless, having done so in this case does not raise issues of *res judicata* or collateral estoppel. The prior jury trial of which inquiry was made concerned issues of severance damages in a condemnation action of which the factual and legal issues were significantly different from the instant trial. The instant trial merely dealt with the denial

of a benefit of the bargain due to a breach of contract. Thus, the primary factual issue in the present trial was how much the fair market value of Mrs. LoBue's property would have appreciated by being adjacent to a county road system. In the prior trial, however, the factual issues of severance damages concerned shrinkage, loss of view, and the benefits that a developing property owner obtains by not having to construct offroad improvements at her own expense. Although the latter factors do have some effect on fair market value (which is why this Court permitted a limited inquiry into those items to determine offsets and credits), nevertheless, those factors do not even remotely reach the *total* consideration of appreciation of fair market value when a road system is constructed alongside one's property.

If defendant should be barred by anything which took place during the prior condemnation trial, then she would be denied her day in court on her contract claim. The explanation lies in the obvious fact that the prior condemnation trial could not, and did not, present the full picture as to how much defendant's property would have appreciated had the County properly performed on the contract it entered into with Mrs. LoBue.

For the foregoing reasons, it is

ORDERED that plaintiff's motion for a new trial is denied.

DATED this 21st day of August, 1978.

/s/ Howard W. Babcock
District Judge

APPENDIX H.

NRCP Rule 15.

* * *

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consents of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

No. 80-1516

IN THE

Supreme Court of the United States

October Term, 1980

MARY LOBUE,

Petitioner,

v.

THE STATE OF NEVADA, *ex rel.*
Department of Highways,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

William M. Raymond
1263 South Stewart Street
Carson City, Nevada 89712
Counsel for Respondent.

APR 9 19[illegible]
ALEXANDER L. ST[illegible]
CLERK

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No. 80-1516

IN THE

Supreme Court of the United States

October Term, 1980

MARY LOBUE,

Petitioner,

v.

THE STATE OF NEVADA, *ex. rel.*
Department of Highways,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Nevada, *ex. rel.* Department of Highways (hereinafter, respondent State of Nevada) respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Nevada Supreme Court's opinion in this case. That opinion is reported at 96 Nev. 505, 611 P.2d 1077.

JURISDICTION

THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. § 1257(3) BECAUSE THE PETITIONER, MARY LoBUE, FAILED TO PROPERLY RAISE HER FEDERAL QUESTION IN THE NEVADA SUPREME COURT.

On page 8 of her petition, Mary LoBue states that she raised the federal question now presented ". . . in her Opening Brief on Cross-Appeal [p. 1], in her Reply Brief [p. 7], and more extensively in her Petition for Rehearing [pp. 18-19] on the fourth appeal." However, as the following argument sets forth, the referenced portions of her appellate briefs were insufficient to notice the state court that a federal right was being claimed and her attempt to claim this right in a petition for rehearing came too late.

A. MERE REFERENCE TO THE STATE AND FEDERAL CONSTITUTIONS IS INSUFFICIENT TO NOTICE THE STATE COURT THAT A FEDERAL RIGHT IS BEING "SPECIALLY SET UP OR CLAIMED."

This Court stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897), that:

> [T]he words "specially set up or claimed" imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare "specially," that is, unmistakably, this court is without authority to reexamine the final judgment of the state court. This statutory requirement is not met

> if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.
>
> . . .
>
> Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.

Specifically, this Court has held that mere reference to the "state and Federal Constitution"[1], or the Constitution of the United States"[2], is insufficient to properly raise a federal question before the state court.

It is therefore submitted that petitioner's reference to the "state and federal constitutions" on page 1 of her opening brief on cross appeal (Appendix "B") and on page 7 of her reply brief (Appendix "C") were insufficient to specially set up and claim the federal question she now presents. This conclusion is buttressed by the unanimous decision of the Nevada Supreme Court (Appendix "A") wherein no language may be found which even suggests that a federal question was raised on appeal, much less decided.

B. THE FEDERAL RIGHT CLAIMED IN THE PETITION FOR REHEARING CAME TOO LATE.

Petitioner Mary LoBue apparently recognized her jurisdictional dilemma and sought to avoid the same by filing a

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[1] *New York Central R.R. Co. v. New York*, 186 U.S. 269, 272-273 (1902).

[2] *Herndon v. Georgia*, 295 U.S. 441, 442-443 (1935); *Harding v. Illinois*, 196 U.S. 78, 88 (1904); *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 248 (1902).

petition for rehearing wherein she alleges on page 17 (notwithstanding her previous averments discussed above) that the decision ". . . has now, for the first time, presented serious State and Federal Constitutional questions . . .". (Appendix "D") However, as Mr. Justice Sutherland stated in *Herndon v. Georgia,* 295 U.S. at 443: "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." (Citations omitted.)

An exception to this rule arises where the decision of the state court could not have been anticipated and a petition for rehearing presents the first opportunity for raising the federal claim.[3] Undoubtedly, petitioner Mary LoBue by alleging in her petition for rehearing that the decision of the Nevada Supreme Court presented "for the first time" certain federal constitutional questions, hopes to come within this exception.

Previous opinions of this Court which recognized this exception involved the following situations: A state court judgment which construed a statute and such construction, for the first time, infringed upon federal rights[4]; a judgment which unexpectedly overruled a line of prior decisions by the Court[5]; and a judgment which uniquely construed a statute to mean "one thing for some cases and another thing for others."[6] In each case, this Court concluded that the decision by the state court could not have

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[3]*Missouri v. Gehner,* 281 U.S. 313, 320 (1930); *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673, 677-678 (1930).

[4]*Missouri v. Gehner, supra* note 3.

[5]*Brinkerhoff-Faris Co. v. Hill, supra* note 3.

[6]*Great Northern Ry. Co. v. Sunburst Co.,* 287 U.S. 358, 367 (1932).

been anticipated during the original proceedings before such court.

Conversely, this Court in *Herndon v. Georgia,* 295 U.S., at 466, held that a litigant cannot "plead ignorance" to prior decisions of a state court, and was bound to anticipate the application of such prior rulings to his own case, and to preserve his right to review in this Court by appropriate action upon the original hearing in the state court. Upon these grounds the Court found "without substance" the contention that the petition for rehearing provided the first opportunity to raise the federal question and the appeal was dismissed for want of jurisdiction.

Similarly, petitioner Mary LoBue cannot "plead ignorance" to the well-recognized estoppel doctrines which form the basis of the decision she now assails. (Appendix "A") These doctrines were discussed at length in *Clark v. Clark,* 80 Nev. 52, 389 P.2d 69 (1964). Further, these estoppel doctrines were not applied *sua sponte* by the Nevada High Court as they were fully discussed by respondent State of Nevada in the briefs on appeal. Moreover, and prior to the appeal, it appears petitioner Mary LoBue fully recognized that the application of these estoppel doctrines could result in the very conclusion ultimately reached by the Nevada Supreme Court. At the trial court level of this matter, the doctrines of judicial and collateral estoppel were fully set forth by respondent State of Nevada in a motion in limine. In opposition to such motion, petitioner Mary LoBue stated that should the trial court grant the motion "there would effectively be no trial."

It is therefore submitted that petitioner Mary LoBue

should have anticipated the possibility of an adverse decision by the Nevada Supreme Court based upon the application of these estoppel doctrines and set forth her federal claim in the appellate briefs. Instead, she waited until her petition for rehearing, which under the foregoing analysis, came too late.

Accordingly, it appears the petition for writ of certiorari does not fall within the jurisdictional requirements of 28 U.S.C. 1257(3) and should therefore be denied.

STATEMENT OF THE CASE

On March 4, 1957, Petitioner and her husband, Vincent LoBue, executed a deed by which they conveyed a 70-foot strip (containing 3.8 acres) and a 40-foot strip (containing 0.37 of an acre) of land for the purposes of extending Bond (now Tropicana Avenue) and Industrial roads, respectively. As stated by the Nevada Supreme Court in the decision to which the petition is directed, "No representations were made as to the width or quality of those roads." (Appendix "A") The County of Clark on September 6, 1962, conveyed these strips of land to the State of Nevada, who utilized the same for the purpose of constructing Interstate 15 and Tropicana Avenue.

On April 17, 1963, the State filed its complaint to condemn 5.19 acres owned by petitioner. On March 17, 1966, petitioner moved for leave to file a counterclaim which sought to have the State pay for an additional area of 4.18 acres which had been conveyed to the County of Clark by said deed of March 4, 1957, and which had been conveyed to the State by quitclaim deeds. On March 30, 1966, the parties entered into a stipulation which provided that the parties would submit the issue of the validity of the LoBue deed to the court on an agreed statement of facts and written briefs, that the County of Clark need not be made a party, and that LoBue could assert against the State "any and all legal rights and remedies that defendant may have or may have had as against the County of Clark." The trial court canceled the deed on the ground of failure of consideration and permitted petitioner to file her counterclaim on July 9, 1966, by which the State was compelled to pay for an additional 3.8 acres conveyed by the March 4, 1957, deed. The State was compelled to compensate LoBue

for the additional 3.8 acres rather than 4.18 acres, as it was ascertained that the 5.19 acres being condemned already included the 40-foot strip conveyed for purposes of constructing Industrial Road.

Upon the State's appeal, the Supreme Court in *State ex rel. Dept. Hwys. v. LoBue,* 83 Nev. 221, 225, 427 P.2d 639 (1967) (Appendix "E"), held that the "ruling below vesting ownership of the disputed parcel in LoBue, thus subjecting that parcel to the condemnation suit, was clearly erroneous," and that "in these circumstances, the grantor's (LoBue) remedy for the failure of Clark County to construct the roads is an action at law for damages; not a suit in equity to cancel the deed." After holding the ruling below to be erroneous, which ruling and counterclaim had compelled the State to pay the fair market value of 3.8 acres conveyed by the March 4, 1957, deed, the court stated:

> Therefore, we reverse and remand for another trial to determine just compensation, severance damages, and benefits, if any, due to the State's condemnation of the two parcels totaling 5.19 acres. The disputed parcel (3.80 acres) is removed from this litigation and the State's title thereto confirmed.

On September 18, 1967, the retrial of the action to condemn 5.19 acres, including access rights to the freeway and approximately 1492 feet of access to Tropicana Avenue, was commenced. Further, as found by the Nevada Supreme Court (Appendix "A"):

> At that trial the jury specifically was instructed to determine the damages sustained by LoBue for the loss of frontage and access along the northerly and westerly boundaries of her property and for the loss

> of the corner. That damage was assessed at $93,777.97. From that amount was deducted the sum of $38,904 representing the benefits LoBue received from the State's construction of the freeway and Tropicana. Judgment was entered on that verdict and has been paid by the State.

From this 1967 judgment, petitioner Mary LoBue did appeal to the Nevada Supreme Court; however, on November 26, 1969, the appeal was dismissed. (Appendix "F")

Thereafter, all litigation in this action was upon petitioner Mary LoBue's counterclaim for breach of contract. In 1971, summary judgment in favor of respondent State of Nevada dismissing petitioner's counterclaim was reversed (87 Nev. 372, 487 P.2d 506); in 1976, a judgment upon jury verdict in favor of the State was reversed (92 Nev. 529, 554 P.2d 258); and in 1980, the Nevada Supreme Court issued the decision which is the basis for the present petition for writ of certiorari. (Appendix "A")

REASON WHY THE WRIT SHOULD BE DENIED

ASSUMING, ARGUENDO, THAT PETITIONER PRESERVED THE CONSTITUTIONAL ISSUE OF THE ALLEGED EXPROPRIATION OF HER PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE WRIT SHOULD BE DENIED FOR THE SIMPLE REASON THAT THERE WAS NO TAKING.

Fourteen years ago, the first decision of the Nevada Supreme Court in *State ex rel. Department of Highways v. LoBue,* 83 Nev. 221, 427 P.2d 639 (1967) confirmed the respondent's title to the 3.8 acres in question. (Appendix "E") Mary LoBue's allegation in her petition that this 3.8 acres was expropriated or taken without the payment of just compensation is merely a pretext to invoke federal jurisdiction. The respondent State of Nevada cannot take, in violation of the Fifth and Fourteenth Amendments, land to which it holds title. As stated by the Supreme Court of North Carolina in *Westcott v. State Highway Commission,* 262 N.C. 522, 138 S.E.2d 133, 136 (1964): " 'The phrase 'eminent domain' by definition admits condemnor did not own, but took or appropriated the property of another for a public use.' "[7]

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[7]See also *Hughes v. North Carolina State Highway Commission,* 2 N.C.App. 1, 162 S.E.2d 661 (1968); *In Re Simmons,* 5 N.C.App. 81, 167 S.E.2d 857 (1969); *Houston North Shore Ry. Co. v. Tyrrell,* 128 Tex. 248, 98 S.W.2d 786 (1936).

The State will not belabor this brief by discussing the cases cited by petitioner or pages 19-21 of her petition. They involve a taking or impairment of access rights for which no compensation was paid. Petitioner Mary LoBue's only possible claim for a taking involved the loss of frontage and access along the northerly and westerly boundaries of her property and for the loss of a corner at that intersection. However, as stated in the Nevada Supreme Court's decision (Appendix "A"):

> This particular claim of damage previously had been litigated in the second condemnation trial. [1967] At that trial the jury specifically was instructed to determine the damages sustained by LoBue for the loss of frontage and access along the northerly and westerly boundaries of her property and for the loss of the corner. . . . Judgment was entered on that verdict and has been paid by the State. It is conclusive upon the parties and not subject to relitigation. (Citation omitted.)

It should be noted that from this 1967 judgment, petitioner Mary LoBue did appeal to the Nevada Supreme Court; however, her appeal was dismissed for failure to comply with rules of appellate procedure. (Appendix "F") It is, therefore, submitted that petitioner Mary LoBue has, at this late date, waived her right to attack, directly or indirectly, the validity of the 1967 condemnation judgment wherein she was awarded "just compensation" for the property and property rights so acquired. As stated by this court in *Harding v. Illinois,* 196 U.S. at 88: "There is nothing to prevent a party from waiving a Federal right of this character [deprivation of property without due process of law] if he chooses to do so, either in express terms or as a

necessary implication from his manner of proceeding in the case."

Therefore, the State of Nevada "has provided adequate machinery for the ascertainment of compensation" *(Appleby v. Buffalo,* 221 U.S. 524, 532 (1911)), and petitioner was not prevented "from obtaining substantially any compensation" *(Chicago, Burlington B&Q R. Co. v. Chicago,* 166 U.S. 226, 247 (1897) so as to constitute a denial of due process enjoined by the Fourteenth Amendment.

The gravamen of petitioner Mary LoBue's argument is contained in her statement of the question presented, i.e., the decisions of the Nevada Supreme Court "[have] effectively deprived a property owner of any remedy to recover just compensation for property which has been taken for public use." Apparently, the remedy, to which petitioner is referring, is her remedy for breach of contract. However, as stated in the opinion (Appendix "A"), petitioner's claimed loss in her contract action was for the same loss for which she received compensation in the 1967 condemnation trial. Obviously, petitioner hoped to recover some additional damages in her breach of contract action.[8] However, the failure to recover damages in her breach of contract action to augment those damages petitioner received in the condemnation action cannot be converted into a "taking."

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[8]Certainly, petitioner cannot claim surprise that she did not recover any additional damages in her breach of contract action. As pointed out by the Nevada Supreme Court: "Our prior opinions had advised the trial court that the measure of damages was the value of the benefit expected by LoBue less the value of the benefit received. Indeed, we noted that she may have received more than she had bargained for." (Appendix "A".)

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

William M. Raymond
Counsel for Respondent

APPENDIX A

Opinion

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA EX REL. DEPARTMENT OF HIGHWAYS, APPELLANT AND CROSS-RESPONDENT, *v.* MARY LOBUE, RESPONDENT AND CROSS-APPELLANT.

No. 11321

June 4, 1980

Appeal and cross-appeal from final judgment entered on jury verdict; Eighth Judicial District Court, Clark County; Howard W. Babcock, Judge.

Reversed with direction to enter judgment for the State.

Richard Bryan, Attorney General, and *Robert A. Calloway,* Deputy Assistant Counsel, Department of Highways, for Appellant and Cross-Respondent.

Foley Brothers, of Las Vegas, and *Ned R. Nelsen,* of Los Angeles, California, for Respondent and Cross-Appellant.

OPINION

Per Curiam:

This cause twice has been remanded to determine damages, if any, owed LoBue by the State. State ex rel. Dep't Hwys. v. LoBue, 83 Nev. 221, 427 P.2d 639 (1967); LoBue v. State ex rel. Dep't Hwys., 92 Nev. 529, 554 P.2d 258

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(1976). On this appeal and cross-appeal each party complains of the manner in which the trial court permitted the jury to determine damages.

In 1957 LoBue unconditionally deeded land to Clark County upon representations that the County would build two roads along the northerly and westerly sides of her remaining property. No representations were made as to the width or quality of those roads. LoBue expected that the construction of those roads would enhance the value of her remaining property. The roads promised by the County in 1957, eventually were constructed by the State in 1966.[1] The road along the northern part of her property is Tropicana Avenue, and a freeway was constructed along the westerly side of her property.

In our first opinion, State ex rel. Dep't Hwys. v. LoBue, 83 Nev. 221, 427 P.2d 639 (1967), we held that LoBue's remedy for the failure to construct the roads was an action at law for damages. We did not know whether she had sustained damage. We stated: "We express no opinon on the point of damages. Perhaps the highway construction by the State benefited LoBue as much as the originally planned county roads; perhaps not." Id. at 226. That expression was reaffirmed in LoBue v. State ex rel. Dep't Hwys., 92 Nev. 529, 554 P.2d 258 (1976).

The benefit for which LoBue had bargained was the increased value of her land by reason of the promised county roads. Those roads were not constructed. In lieu thereof, the State subsequently constructed a freeway and

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[1]In 1971 an issue arose as to whether the State was obliged to defend LoBue's claim for damages originally asserted against Clark County, the State's predecessor in interest. We ruled that the State was obliged to defend. LoBue v. State ex rel. Dep't of Hwys., 87 Nev. 372, 487 P.2d 506 (1971).

Tropicana Avenue. Our prior opinions had advised the trial court that the measure of damages was the value of the benefit expected by LoBue less the value of the benefit received. Indeed, we noted that she may not have sustained damage; that she may have received more than she had bargained for. See concurring opinion, Zenoff, State ex rel. Dep't Hwys. v. LoBue, 83 Nev 221, 427 P.2d 639 (1967).

Her amended counterclaim for damages, however, did not allege that the expected benefit from the bargained for county roads would have been greater than the benefit actually received from the construction by the State of the freeway and Tropicana Avenue, resulting in damage. What she did claim was damage by reason of the loss of frontage and access along the northerly and westerly boundaries of her property and the loss of a corner at that intersection.

This particular claim of damage previously had been litigated in the second condemnation trial. At that trial the jury specifically was instructed to determine the damages sustained by LoBue for the loss of frontage and access along the northerly and westerly boundaries of her property and for the loss of the corner. That damage was assessed at $93,777.97. From that amount was deducted the sum of $38,904 representing the benefits LoBue received from the State's construction of the freeway and Tropicana. Judgment was entered on that verdict and has been paid by the State. It is conclusive upon the parties and not subject to relitigation. Clark v. Clark, 80 Nev. 52, 389 P.2d 69 (1964).

The issues of judicial estoppel and collateral estoppel, and the doctrine of Clark v. Clark, supra, were presented

to this court on the last appeal of this case. Had we resolved those issues the trial we are now reviewing on the amended counterclaim would not have occurred. Apparently, our failure to do so caused the trial judge to believe that those doctrines did not bar the damages sought by the amended counterclaim. We did not intend that interpretation of our opinion.

Since LoBue does not claim that the expected benefit from the bargained for county roads would have been greater than the benefit actually received from the construction of the freeway and Tropicana, and since she already had been compensated for the damage she does claim, we reverse the judgment entered upon jury verdict, and remand with direction to enter judgment for the State upon LoBue's counterclaim for damages.

MOWBRAY, C. J.
THOMPSON, J.
GUNDERSON, J.
MANOUKIAN, J.
BATJER, J.

APPENDIX B

Page 1 of Petitioner Mary LoBue's Opening Brief on Cross-Appeal to the Nevada Supreme Court

I.

STATEMENT OF THE CASE

Mary LoBue, the Defendant and counterclaimant herein has filed a cross appeal from that portion of the Judgment on the Verdict that relates to the Second Phase of the trial. This Second Phase permitted the State of Nevada to offset a portion of the compensation awarded in the condemnation trial of 1967, from the damages awarded for the breach of a contract entered into between Mary LoBue and Clark County for the opening and improving of Bond Road (now known as Tropicana Avenue) and Industrial Road. The allowance of such an offset not only violates well established principles of law but also effectively deprives defendant and counterclaimant of a portion of the just compensation guaranteed by Nevada and the Federal Constitutions.

This Court has previously determined that Clark County breached its agreement by its failure to construct the promised roads and that the only issue to be determined in the present proceeding was the matter of damages. See State ex rel. Department of Highways v. LoBue, 83 Nev. 221; 427 P.2d 639 (1967) (LoBue I.) Mary LoBue v. The State of Nevada, 92 Nev. 529; 554 P.2d 258 (1976) (LoBue III.)

In this proceeding the Court concluded that the breach occurred on September 6, 1962, the date on which the

County quit-claimed to the State the parcels of land previously deeded by Mrs. LoBue to Clark County. The eminent domain proceeding by which the State sought to acquire a portion of Mrs. LoBue's property for the right of way for the construction of the

APPENDIX C

Page 7 of Petitioner Mary LoBue's Reply Brief to the Nevada Supreme Court

Monahan's letter reads,

> "With reference to your letter of October 20, 1961 regarding the right-of-way deeded to Clark County by Mr. and Mrs. LoBue for road-way purposes, please be advised that plans have not been abandoned for the construction of these roads but on the contrary, they are to be constructed to a much higher standard than originally planned."

The principle of "just compensation" comes into play in two directions. If any portion of the award provided for in the condemnation proceeding is taken from her, Mrs. LoBue has to that extent been deprived of the just compensation guaranteed by the State and federal constitutions for the property acquired for the freeway and the damages accruing from the taking of a portion of her property and the construction of the freeway improvement. On the other hand, if the damages awarded for the breach of contract are diminished, she has been deprived of the compensation due to her for the 4.17 acres deeded for road purposes. The contractual right to have the proposed roads constructed as promised adds to the value of the remaining property. The State's intervention which frustrated the County's project had the effect of depriving Mrs. LoBue of a substantial element of value. While there may have been some question in the past as to whether the taking of a contractual right that gives value to property was compensable, this issue has now been fully resolved by

APPENDIX D

Pages 17, 18 and 19 of Petitioner Mary LoBue's Petition for Rehearing to the Nevada Supreme Court

[Page 17]

* * * from that figure, the value of LOBUE's property as of the same date, assuming that the Freeway, Off-Ramp and Tropicana were completed at that date and further subtracting the net condemnation verdict reached in 1967 including the additional land taken as well as all net severance damages, or a net figure of $285,640.64.

This is precisely what the STATE was seeking by way of its appeal from the last trial. This would also permit LOBUE to have her day in court as was contemplated by this Court in its first Opinion, when it stated:

> "We express no opinion on the point of damages. Perhaps the highway construction by the State benefitted LOBUE as much as the originally planned county roads. Perhaps not."

In all its prior decisions, this Honorable Court has held that LOBUE was entitled to a trial to determine her damages, if any. To now hold that she is not entitled to proceed is contrary to the law of the case.

VI.

STATE AND FEDERAL CONSTITUTIONAL QUESTIONS.

The STATE's prayer for relief on appeal was: "Accordingly, and based upon these errors of the trial court, it is respectfully submitted that the Judgment upon the Verdict

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entered in this cause be reversed and remanded together with appropriate instructions to the trial court regarding the measure of damages". (Appellant's Reply Brief, page 23, dated April 27, 1979).

This Court's reversal with directions to enter Judgment for the STATE, not prayed for by the STATE, has now, for the first time, presented serious State and Federal Constitutional questions which would not have arisen had the Court granted the STATE's prayer that "the cause of

[Page 18]

action be reversed * * * and remanded together with appropriate instructions to the trial court regarding the measure of damages".

These serious State and Federal Constitutional questions mandate that a Rehearing is necessary to promote substantial justice.

The serious State and Federal Constitutional questions may be delineated as follows:

1. The decision of this Court effectively deprives LOBUE of her right to a trial by Jury as guaranteed by Section 3 of Article 1 of the Nevada Constitution and the Fourteenth Amendment of the United States Constitution.

2. The decision of this Court has impaired the obligation of contract by depriving LOBUE of her right to damages for a breach in violation of Section 8 of Article I of the Nevada Constitution and the Fourteenth Amendment of the United States Constitution.

3. The decision of this Court has in effect authorized the appropriation of 3.80 acres of LOBUE's property without the payment of either just compensation for the property taken nor the payment of damages for the breach of

contract on the failure of Clark County to perform its promised performance, in violation of Section 8 of Article I of the Nevada Constitution and the Fourteenth Amendment of the United States Constitution.

4. If the trial court failed to properly define the measure of damages, due process requires that the cause be remanded for a new trial with directions.

5. Due process of law requires that if there is any question as to the procedure followed or the propriety of the measure of damages submitted to the jury, the matter should be remanded to the trial court for a new trial with directions.

[Page 19]

* * * Normally, on an appeal from a judgment for damages for a breach of contract, the role of the appellate court is to determine whether there have been any errors of law and whether the judgment or verdict is supported by substantial evidence. It is, of course, not the function of an appellate court to reweigh the evidence. See Utley v. Airoso, 86 Nev. 116, 464 P.2d 778; Solar, Inc. v. Electric Smith Const., 88 Nev. 457, 459; 449 P.2d 649 (1972) Savini Const. Co. v. A & K Earthmovers, 88 Nev. 5, 7; 492 P.2d 125 (1972).

Where an appellate court makes findings of fact contrary to those made by a jury on conflicting evidence, the effect is to deprive the parties of their constitutional right to a jury trial.

VII.

CONCLUSION

For seventeen years now, LOBUE and her counsel have worked diligently to obtain for her the just compensation

guaranteed to a property owner by both the State and Federal Constitutions where private property has been appropriated for public use. It is unfortunate that this case has been presented in a piecemeal fashion as a result, the issues seriously confused. This, however, is not the fault of LOBUE nor of her counsel. The fact is that as a result of this confusion, the State now has title to 3.80 acres of LOBUE's property without having compensated her either for the fair market value of this property, nor in the way of damages for the breach of the agreement to open and improve the roads that were promised. It would be grossly unfair to deprive LOBUE of the benefits of her bargain by a failure to fully examine the facts and the issues presented to this Court in this appeal. A Rehearing should be granted and the Judgment affirmed.

APPENDIX E

Opinion

THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF HIGHWAYS, APPELLANT, *v.* MARY LOBUE, RESPONDENT.

No. 5228

May 18, 1967 427 P.2d 639

Appeal from judgment of the Eighth Judicial District Court, Clark County; George E. Marshall, Judge.

Condemnation case. From an award entered by the lower court the state appealed. The Supreme Court, THOMPSON, C. J., held that where grantor by unconditional grant deed conveyed to county, which made an unconditional acceptance, and where the underlying consideration, given sincerely and innocently in the belief that it would be fulfilled, failed, grantor could not sue in equity to cancel deed but was left only to an action at law for damages.

Judgment reversed and cause remanded.

[Rehearing denied June 29, 1967]

Harvey Dickerson, Attorney General, Carson City, and *Melvin L. Beauchamp,* Deputy Attorney General, for Appellant.

Foley Brothers, of Las Vegas, and *Cooper and Nelson* of Los Angeles, California, for Respondent.

1. COUNTIES.

Evidence in condemnation case sustained findings that grantor was induced to execute deed to county because of representations by authorized agents of county that her remaining

property would be benefited by having 2900 feet of additional frontage along the roads to be constructed by the county, that representations were sincerely and innocently made in the belief that they would be fulfilled, that county did not build roads, that consideration for conveyance failed and that grantor did not intend gift or a dedication of the land for public use.

2. DEEDS.

Mere statement of use to which land conveyed is to be devoted, and in consideration of which conveyance is made, does not subject estate transferred to a condition subsequent. NRS 111.170.

3. CANCELLATION OF INSTRUMENTS.

Failure of consideration for unconditional grant deed, without more, does not justify equitable relief, and grantor's remedy when bargained for consideration fails is an action at law for damages.

4. DEEDS.

Conveyance in consideration of promise to support grantor is treated differently than an ordinary commercial conveyance.

5. CANCELLATION OF INSTRUMENTS.

Where grantor by unconditional grant deed conveyed to county, which made an unconditional acceptance, and where underlying consideration, given sincerely and innocently in the belief that it would be fulfilled, failed, grantor could not sue in equity to cancel deed but was left only to an action at law for damages.

OPINION

By the Court, THOMPSON, C. J.:

This is a condemnation case commenced by the State against Mary LoBue to acquire two separate parcels of land (5.19 acres) in Clark County for interstate highway purposes. Sometime before trial the parties, through counsel, stipulated that the ownership of another parcel of land (3.80 acres) to which the State held record title adverse to LoBue's claim of ownership, could be decided by the Court in this litigation.[1] It was understood that if the court

[1]On March 4, 1957 LoBue, by grant deed, had conveyed the disputed acreage to Clark County. On September 6, 1962 the County, by

found for LoBue the scope of the condemnation case would be enlarged to embrace all of the land, that is 8.99 acres, and the cause then tried to a jury to find just compensation and assess severance damages. On the other hand, should the court rule for the State, the disputed parcel would not be included in the condemnation jury trial. The case thus became a bifurcated affair—the first dispute, an equitable proceeding, to be resolved by the court; and the second, the condemnation case, to be decided by a jury.

The district court ruled that LoBue was the owner of the disputed land, and, in effect, cancelled the deeds through which the State had acquired title. Consequently all three parcels totalling 8.99 acres were included in the jury trial which followed. The jury awarded LoBue $548,525 as just compensation for the property taken; $108,205 severance damages; and found that the remainder of some of her property was benefited by the highway to the extent of $5,000. A judgment for $651,730 with interest then accrued of $127,567.40 was duly entered. This appeal by the State ensued.

The main claim of error is addressed to the court's finding that LoBue was the owner of the disputed acreage to which the State held record title. Since the jury returned a lump sum verdict for all of the property condemned ($548,525) without assessing compensation for each parcel separately, and as the failure to segregate by parcel likewise affects the lump sum severance damages awarded, this assigned error, if sustained, requires a reversal of the

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quitclaim deed, conveyed its title to the State. The stipulation provided, inter alia, that Clark County need not be joined as a party to the litigation and that LoBue could assert against the State all rights and remedies that she may have had against Clark County.

entire case. It is our opinion that the ruling below vesting ownership of the disputed parcel in LoBue, thus subjecting that parcel to the condemnation suit, was clearly erroneous. Therefore, we reverse and remand for another trial to determine just compensation, severance damages, and benefits, if any, due to the State's condemnation of the two parcels totalling 5.19 acres. The disputed parcel (3.80 acres) is removed from this litigation and the State's title thereto confirmed.

[Headnote 1]

On March 4, 1957 LoBue, by grant deed, conveyed the disputed parcel (3.80 acres) to Clark County. The County Commissioners, by resolution, accepted the conveyance unconditionally and recorded the deed. On September 6, 1962 Clark County conveyed its title to the State. The trial court made the following relevant findings: That LoBue was induced to execute the deed to the County because of representations by authorized agents of the County that her remaining property would be benefited by having 2900 feet of additional frontage along the roads to be constructed by the County; that representations were sincerely and innocently made by the County agents in the belief that they would be fulfilled; that the County did not build the roads; that the consideration for the conveyance failed; and that LoBue, as grantor, did not intend a gift or a dedication of the land for public use. As we read the record each finding is supported by substantial evidence.

[Headnote 2]

We turn first to examine the grant deed. It is unconditional in form. The words used are: "* * * the undersigned grantor does hereby grant, bargain, sell and convey to

Clark County, Nevada, for street and road purposes, all of the following described land * * *." Those words do not provide for termination of the estate conveyed upon the occurrence or non-occurrence of a specified event. It is well settled that a mere statement of the use to which the land conveyed is to be devoted, and in consideration of which the conveyance is made, does not subject the estate transferred to a condition subsequent. I Rest. Prop. Sec. 45, p. 143; 3 Powell, Real Property, p. 143; Greene v. O'Connor, 25 A. 692 (R.I. 1892); Fuchs v. Reorganized School Dist., 251 S.W.2d 677 (Mo. 1952); Gramer v. City of Sacramento, 41 P.2d 543 (Cal. 1935); Booth v. Los Angeles County, 12 P.2d 72 (Cal.App. 1932); See also NRS 111.170 [where it is provided that the words "grant, bargain and sell" are used to convey an estate in fee simple unless restrained by express terms contained in the deed]. Additionally, we note that the deed does not provide for reverter to or re-entry by the grantor.

The acceptance of the deed by the County was likewise unconditional. [Cf. State ex rel. Dep't of Hwys. v. Wells Cargo Inc., 82 Nev. 82, 411 P.2d 120 (1966) where Clark County accepted a grant deed from Wells subject to a condition—the right of Wells to encroach upon the property conveyed where Wells' weighing installations were located—and the Court held that Wells had retained an easement which was compensable in an eminent domain proceeding.] Thus, an absolute, unconditional transfer of title occurred when LoBue made and delivered her grant deed to Clark County.

The consideration for that conveyance failed. Clark County did not construct the roads. That failure, however, was not accompanied by fraud or bad faith on the

part of the County. The County acted in good faith in making its representations. Apparently it did not complete the road project because the State's proposed highway plan rendered the County project unnecessary.

[Headnote 3]

The State's claim of error centers on the proposition that failure of consideration for an unconditional grant deed, without more, does not justify equitable relief. Fraud in the inception of the transaction, or some kindred circumstance, must exist before recission or cancellation is in order. Abundant case authority sustains this contention. Desert Centers, Inc. v. Glen Canyon, Inc., 356 P.2d 286 (Utah 1960); Williams v. Sullivan, 138 S.E.2d 368 (Ga. 1964); City of Cleveland v. Herron, 131 N.E. 489 (Ohio 1921); Suburban Properties, Inc. v. Hanson, 382 P.2d 90 (Ore. 1963); Hewett v. Dole, 124 P. 374 (Wash. 1912); Miller v. Village of Brookville, 89 N.E.2d 85 (Ohio 1949); Lawrence v. Gayetty, 20 P. 382 (Cal. 1889); Borden v. Byvin, 130 P.2d 718 (Cal.App. 1942); Norby v. Pister, 250 P.2d 633 (Cal.App. 1952). The grantor's remedy when the bargained for consideration fails and a reason for equitable relief is not present, is an action at law for damages.

[Headnote 4]

LoBue acknowledges the law as we have stated it but insists that Nevada has adopted a different rule; that failure of consideration, without more, will, in this State, allow equity to intervene and cancel a deed. Kerr v. Church, 74 Nev. 264, 329 P.2d 277 (1958). Though it is true that in Kerr this court affirmed a decree cancelling a deed upon the ground that the consideration therefore failed, we think that case properly falls within a well

established exception to the rule we have just related. The prevailing view in this country favors the recission of a deed if the grantee fails to perform his promise to support the grantor. The essence of Kerr was the failure of the grantee to allow the grantor, during his lifetime, to jointly use the home which was the subject of the deed. Clearly this was a form of support. The rationale underlying the "support exception" varies: inadequacy of the legal remedy (Ford v. Ford, 43 N.E.2d 756 (Ohio 1942)); theory of a breach of a condition subsequent (Nadler v. Nadler, 8 N.W.2d 306 (Wis. 1943)); the failure to support raises a presumption of fraud at the inception of the transaction (DaCosta v. Bischer, 122 N.E. 819 (Ill. 1919)); (Sethmann v. Bulkley, 61 P.2d 765 (Cal. 1936)); and, the mere failure of consideration (Martinez v. Martinez, 141 P. 469 (Colo. 1914)). Whatever the reason assigned, it is clear that a conveyance in consideration of a promise to support the grantor is treated differently than an ordinary commercial transaction. Comment: 9 U.Pitt.L.Rev. 206 (1948); annot. 112 A.L.R. 670.

In addition to the Kerr case our attention is directed to the decision of Russell v. Ruffcorn, 54 Nev. 162, 10 P.2d 632 (1932) where, on appeal, the court directed cancellation of a deed because the consideration therefor failed. In that case, however, the parties had also executed a contract which provided that the deed was to be accepted as part payment for stock held in escrow pursuant to a conditional permit of the Commissioner of Corporations of California under which the stock was not to be sold without the written consent of the Commissioner. His consent was not secured, though both parties to the agreement, at the

time it was entered into, apparently believed that no difficulty would be experienced in obtaining the Commissioner's consent—a mutual mistake. That circumstance, coupled with the failure of consideration, led the court to decree equitable relief. Such additional factors are not present in the case at hand.

[Headnote 5]

We conclude that, in these circumstances, the grantor's (LoBue) remedy for the failure of Clark County to construct the roads is an action at law for damages; not a suit in equity to cancel the deed. The reason for withholding equitable relief is the need for preserving the finality of a deed and the integrity of title to real property. This can best be accomplished by limiting the grantor to the remedy of damages. We express no opinion on the point of damages. Perhaps the highway construction by the State along the disputed parcel benefited LoBue as much as the originally planned County roads; perhaps not. That question was not presented to the trial court for decision.

For the reasons expressed the judgment below is reversed and the cause remanded.

COLLINS, J., concurs.

ZENOFF, J., concurring:

The peculiar circumstances surrounding the execution of the grant deed for road purposes captured more than my usual interest because I was the trial judge in State ex rel. Dep't of Hwys. v. Wells Cargo, Inc., 82 Nev. 82, 411 P.2d 120 (1966). Initially, I did not see the distinction between the subject of the deed in this case from the execution of the deed to the county in the Wells case. It seems clear now that Mr. Justice Badt found that in Wells the

trial judge was correct in his conclusion, though not in the way in which he arrived at it.

In this case, LoBue gave the deed for street and road purposes in return for a promise that a road would be constructed along the remainder of the property. An interstate highway was built on the property, though not by the promising party and not to the same specifications as originally promised. Yet, not only was the promise kept but the road is a much more travelled artery as an interstate highway than as a county road. It is reasonably probable that respondent received even more than bargained for.

APPENDIX F

Order of the Nevada Supreme Court Dismissing Petitioner Mary LoBue's Appeal from the 1967 Condemnation Trial

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY LO BUE, APPELLANT, *v.* THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF HIGHWAYS, RESPONDENT.

No. 6053

November 26, 1969

ORDER DISMISSING APPEAL

The notice of appeal in this case was filed on March 28, 1968. The appellant has failed to cause the record on appeal to be filed and docketed with this court. Furthermore, she has failed to seek an extension of time for filing and docketing the appeal. In addition the appellant has failed to file with this court her designation of contents of record on appeal.

On November 4, 1969, the respondent filed its motion to dismiss the appeal. In the following cases the appeal was dismissed when there was no request made for an extension of time in which to docket the record: Doolittle v. Doolittle, 70 Nev. 163, 262 P.2d 955 (1933); Bank of Nev. v. Drayer-Hanson, 70 Nev. 416, 270 P.2d 668 (1954); Cole v. Cole, 70 Nev. 486, 274 P.2d 358 (1954); McDowell v. Drake, 77 Nev. 136, 360 P.2d 257 (1961); Board of

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Trustees v. Savage, 77 Nev. 327, 363 P.2d 354 (1961); Dreyer v. Dreyer, 74 Nev. 167, 325 P.2d (1958).

The appellant has failed to comply with Supreme Court Rule 26(3) by serving and filing her reply to the motion to dismiss more than ten (10) days after the respondent had filed its motion to dismiss.

Good cause appearing, IT IS ORDERED that the respondent's motion to dismiss the appeal is granted.

Dated this 26th day of November, 1969.

COLLINS, C. J.
ZENOFF, J.
BATJER, J.
MOWBRAY, J.
THOMPSON, J.